

Information to the
House of Nobility
for James Carnegie
of Finhaven, with
James Fortelling the last
of Strathmore



JULY 29th, 1748. 28

INFORMATION FOR JAMES CARNEGIE of Finhaven Pannel;

AGAINST

SUCANNA Countess of Strathmore, The Honourable
Mr. JAMES LYON, Pursuers, and His Majesty's Ad-
vocate, for His Highness Interest.



HE said *James Carnegie of Finhaven*, stands
indicted before your Lordships, of wilful and
premeditate Murder and Homicide; in so far
as, *Having a causeless ill Will and Resentment*
against the deceased Charles Earl of Strathmore;
he conceived a deadly Hatred and Malice a-
gainst him; and on the Day libelled, did with a drawn
Sword, without the least Colour or Cause of Provocation
then

(2)
then given by him, invade the said deceased Earl; and did
basely and feloniously murder and kill him, by giving him a
Wound therewith in the Belly, whereof he soon after died: At
least, at the Time and Place described, the said Charles Earl
of Strathmore, was with a drawn Sword, feloniously and
barbaurosly wounded, and died of the said Wound within a
few Days thereafter, and that the Pannel was Art and
Part in this Murder. And the Indictment concludes, ' By
' all which it is evident, That you are guilty Art and Part
' of the Crimes of wilful and premeditate Murder and Ho-
' micide, or one or other of them, at the Time and Place, and
' in the Manner above set forth.'

THE Pannel was brought to your Lordships Bar, upon the
15th of July current, to plead to this Indictment, where he
appeared under that deep Melancholy and Depressure of Spi-
rit, with which a Man and Christian must be loaded, who
finds himself accused, not only of shedding of Blood, but of
shedding the Blood of one, whose personal Character and
Qualities drew from all who had the Honour to know him,
the highest Esteem and Regard; and for whom the Pannel
himself had all the Honour, intire Friendship, sincere Affec-
tion and high Respect, That either his Rank, personal Me-
rit, or great Benevolence could call for; and of having done
this barbaurosly from premeditated Malice, deadly Hatred,
and Felony forethought.

YOUR Lordships having put the Question to him, in
the ordinary Way, What he said to the Indictment? he
expressed himself in these Words,

My Lords,

I find my self accused by this Indictment, of maliciously
murdering the Earl of Strathmore; but, as to any Ill-will,
Malice or Design to hurt the Earl, God is my Witness,
I had none: On the Contrary, I had all the due Regard,
Respect and Kindness for his Lordship, that I ever had
for

Rec. Mar. 19, 1702.

for any Man. I had the same that Day to be mortally drunk, for which I beg Pardon; so that, as I must answer at God's great Tribunal, I do not remember what happened, after I got the Affront your Lordships will bear of from my Lawyers. One Thing I am sure of, if it shall appear that I was the unlucky Person who wounded the Earl, I protest, before God, I would much rather that a Sword had been sheathed in my own Bowels. And further, I declare, That I do not so much as remember, that I saw the Earl after I came out of the Kennel, and even not so much as the drawing of my Sword; and therefore, I cannot acknowledge the Libel, as it is libelled.

FROM these Words so expressed, it is evident, in what a dismal Situation of Mind, this unhappy Gentleman must be. If what he hath said be true, he cannot be guilty of the malicious Murdering the deceased Lord; yet he may have been the unhappy Instrument of his unfortunate Death; and what a bitter Reflection that must afford, all Circumstances, particularly that of Friendship, considered, will occur to every generous Man: It may produce Thoughts more afflicting than that of Death it self.

THE Council for the Pannel, in the Entry to the Debate, judged themselves under a Necessity, from the great Honour all of them had for the Person of the deceased Lord, and always will have for those who remain of his Family, and from the particular Obligations of Friendship, that some of them owed him in a more distinguished Manner, to declare, That if they had the least Apprehensions, that his Lordship's Death had happened by or from any Design or Intention of the Pannel against his Life, that no Motive, even of Relation or natural Ty to the Pannel, would have induced them to open their Mouth in his Defence; but that Innocence is always presumed, and that the Circumstances, so far as yet appears, seem to set forth

the Action as a *Fatality*, and not a *Design*, Justice and Duty called upon them to give their weak Assistance, until the Matter appear'd in another Light.

THE Fact, as laid in the Libel, is in very general Terms, and those Circumstances from which the Nature of the Action falls to be determined, and which are material for the Pannel's Defence, being intirely omitted, the Procurators for the Pannel were obliged to set forth the Case as it truly happened; according to the Information given them; which, by our Law and Form, they are enabled to do, without owning the Libel, or admitting even those Facts, which, in the Recital, according to Information, they are led to narrate: And the Account given of it was,

THAT on the 9th of May last, *The deceased Earl of Strathmore, the Pannel, and several others, were called to be present at the Funeral of a Daughter of Patrick Carnegie of Loures, a near Relation of the Pannel's: That they din'd together at the Gentleman's House, where they drunk a good Deal, all in Friendship and Familiarity, without the least Appearance of Quarrel or Difference. That after the burying was over, they, together with the Lord Roschill, Mr. Thomas Lyon, and Mr. Lyon of Bridgeton, and other Gentlemen, went to one Clerk Dickson's, a Tavern in Forfar, where they drunk pretty plentifully, and where the Pannel happened to be overtaken with too much Liquor. That all this while, nothing but Friendship appeared betwixt the deceased Earl and the Pannel; but, that Bridgeton was from Time to Time bearing hard upon the Pannel; and by the whole Tenor of his Conversation, endeavouring to fret or affront him.*

AFTER this, the Pannel waited on the Lord Strathmore, at the Lady Auchterhouse's, where his Lordship went to visit, and Bridgeton followed them thither, and in that House begun the former Way of Conversation, making the
Pannel's

Pannel's Family-Concerns the Subject of his Discourse, in the most provoking Manner, asking him in a Fiery Way, to supply a Lord in the Company with Money, putting him rudely by the Breast, and gripping him by the Wrist, and striking his Hand against the Table, telling him, he must give that Lord such a Sum at that Time; then insisting, That he should give him the Choice of his Daughters; and still gripping him, and dashing his Hand in the foresaid rude Manner, told him, he would have him promise to do so; and asking him in an insolent Way, what, would he not do it? Then telling him, if it were his Case, if he refused, he would maul him, shaking his Hand in the Pannel's Face. After this, in a ridiculing Way, desiring him to settle his Estate in a certain Manner, since he had no Sons of his own; then upbraiding him with his Debt. All which, the Pannel bore with Patience, and endeavoured to ward off the Discourse, when Bridgeton still insisted in the most provoking Way. And that Bridgeton likewise used very great Rudeness to the Lady in whose House they were; particularly, when she in Civility offered him a Glass of Brandy, he, seeing the Pannel already overtaken with Drink, desir'd the Lady to give it to him her Brother; and upon her saying, that her Brother did not seem to want it at that Time, he grip'd her by the Arm so rudely, as to make her complain, and swore by God, her Brother either should drink it, or she should drink it her self; and persisted in this Way of doing, till the Lord Strathmore thought it proper to break off the Visit, and so went out of the House.

THAT Finhaven and Bridgeton followed the Earl, and when they came to the Street, some Words pass'd, and Bridgeton used the Expression, God damn him, meaning the Pannel, and with that grip'd him by the Breast, and push'd him into a dirty Kennel two Foot deep, over Head and Ears, where, in the Condition he was, he might have been smothered, if a Servant of the Earl's had not helped him out,
who

who at the same Time exprest his Indignation at the Action he had seen, by these Words address'd to Bridgeton, Sir, that you be a Gentleman, you are uncivil.

THAT Bridgeton, after having so flung the Pannel into the Kennel, leaving him there, walked forward; at the same Time turning about, and folding his Arms a-cross his Breast, scornfully laugh'd at him in that Condition.

THAT the Pannel being helped out of the Kennel in Manner foresaid, immediately drew his Sword, and in a just Passion, pursu'd Bridgeton with a staggering Pace: And Bridgeton run towards the Earl of Strathmore, whose Back was then to him, and endeavoured to pull out his Sword; at which Time the Pannel coming up with Bridgeton, made a Push at him, in which Instant, the Earl turning hastily about, Pusht off Bridgeton, and threw himself in the Way of the Sword, by which he received the fatal Wound.

THESE are the unlucky Circumstances of the Fact, as the Lawyers for the Pannel have been instructed to plead: And from it as so stated, the Defence insisted upon for the Pannel was, That the Act of Killing is not Murder nor Capital, where there is no Malice nor Forethought against the Person kill'd, either prov'd to have been conceiv'd and retain'd at any Time preceeding the Act of killing, or presumed from the Circumstances to have preceeded the Act immediately before the committing of it; But that in this Case, there is no antecedent Malice specified or libelled; and therefore, it must be taken for granted, that there was none. And as to presumed Malice immediately preceeding the Act, that the Circumstances entirely exclude that Presumption; first, because as the Fact is laid, any Blow or Push that was intended, was made at, and design'd for Bridgeton, and not against the Earl of Strathmore; and since the *initium facti* is to be considered, as well as the Event, a Push begun and intended against Bridgeton, could never be the Foundation of

a Presumption of Malice against the Lord *Strathmore*, the Person kill'd, without which, the killing could not be Capital, but in this Case was merely *casual* and *accidental*, it having happened by the Earl's unluckily turning about in the Time of the Pannel's very Act of pushing against *Bridgeton*, whereby the Earl received the fatal Wound. 2do, That the Pannel could never be more criminal in having kill'd the Earl of *Strathmore* by a Thrust directed at *Bridgeton*, than he would have been if he had kill'd *Bridgeton* himself; but that so it was, That if he had kill'd *Bridgeton*, after the Provocation given in Manner above set forth, That it would have been constructed only as casual or culpable Homicide, without Forethought, because done *ex incontinenti*, & *ex subito impetu*, & *Calore justæ iracundiæ*; yea, in some Measure in Self-defence, since the Pannel having been thrown into the Kennel, even to the Danger of being suffocated, he had Reason after that to expect the worst from *Bridgeton*, since no Gentleman will throw another into a Puddle, who is not supposed to be ready to go further, as he cannot but expect the strongest Retortion of the Injury; and that the Pannel had the more Reason to think so, that *Bridgeton* immediately betook himself to the Earl of *Strathmore*'s Sword, and endeavoured to pull it out, having none of his own, by Reason that the known Ferocity of his Character and Behaviour, is such, That the Country Gentlemen of his Acquaintance, decline to keep Company with him, if he wear any Arms: In such Case the Pannel was to expect the worst, and so was in some Measure in his own Defence, altho' he may have exceeded the *moderamen inculpatae tutelæ*; which Excess in such Circumstances, would not be punishable by Death, but only by an arbitrary Punishment.

And in Support of this Defence, the Council for the Pannel shall now, in this Information, endeavour, tho' somewhat out of the Order of their Pleading, to follow the Information given in the for Pursuers. And *first*, To show your Lordships, that Killing in such Circumstances was not capital by the Divine Law,

or

of Law of *Moses*. 2^{do}, That it was not capital by the Common Law, which we in great Measure follow in Matters of that Kind. 3^{to}, That it was not capital by our own ancient Law. 4^{to}, That our ancient Law in that Particular is not altered by the Statute of *Char. II.* 5^{to}, That the Practice of the Court is not inconsistent, but agreeable to what is here pled; And 6^{to}, That the Laws of our neighbouring Nations are for most part consonant to those Principles, as well as the Judgments of foreign Courts.

AND to begin with the Divine Law, it may be divided in two; *First*, the Law of Nature, which is the first of all Laws, and hath no other Author than God Almighty himself. 2^{do}, His Will revealed by Writing, particularly in the Laws delivered by *Moses*.

AND as to the Law of Nature, one of the first Principles seems to be, that every Action must be construed and regulated from the Intention of the Actor. Every Action whatever, except in so far as it is conjoined with the Will and Intention of the Agent, differs in Nothing from the Action of an irrational Creature; yea if we may so speak, as to call the Operation or Impulse of an inanimate Creature an Action, the Actions of Man separated from his Intention and Design as a rational Creature, differs in nothing from the Actions of Brutes, or the Impulse of Things inanimate; and consequently that Action, be what it will, can neither be Crime nor Virtue; It is a mere Impulse or Motion, not properly subject to Laws or Rules. But then indeed, when it comes to be conjoined with the Intention, or, which is the same Thing, considered as the Action of a rational Agent, there it comes to be subject to Laws, to be considered as criminal or virtuous: Or if it appear to be accidental, so as to have depended upon no Will nor Deliberation of Reason, then it returns to be of the Nature of the Act of an irrational Creature, or inanimate Substance, and is subjected to no Penalty, nor yet capable of receiving a Reward. The plain Consequence of which

is, That it is the *Animus* alone that determines the Nature of the Act ; and if the *Animus* or Intention was criminal, then, by the Law of Nature, the Action it self amounts to a Crime. On the other Hand, if it be good and virtuous, the Act is laudable by the Law of Nature, supposing even a bad Consequence should follow. But in the 3d Place, If the Action truly arise from no Intention or Principle governing that Action, it is neither laudable nor punishable, it returns to be of the Kind already mentioned, the same with the like Act of an irrational Creature, or the Impulse of an inanimate Substance moved by a Cause *extrinsic* to itself. And the Consequence of all this is, that by the primary Law of Nature, the *Intention* must make the *Crime*; and therefore if there appear no Intention to commit that particular Fact which happens to be complain'd of, it is not a Crime, notwithstanding of a bad Consequence; it is considered as a Fatality.

AND the Application is plain to the present Argument, That if the unfortunate Act of killing the deceased Lord, did not flow from any Intention to him directed ; then that Act, is not by the Law of Nature a criminal Act, however the antecedent Acts directed against another, may be criminal. It is an other Question, How far a rational Agent, *versans in illicito*, is bound for Consequences ; that did not fall under his Intention. We shall afterwards endeavour to show, That that is neither a Question in the Law of Nature, nor in the Divine Law, but is a Question arising from the municipal Laws of particular Kingdoms, or at farthest from the Law of Nations, sometimes called the Secondary Law of Nature.

As this Point, That the Intention directed towards the Act committed, must govern the Action, so as to render it Criminal or not, according to the first Principles of the Law of Nature, seems to be pretty plain, if we retire our Thoughts from other after Laws ; So indeed it is confirmed, and illu-

frated by the written Law of God, as delivered by *Moses*, with Regard particularly to the Question of Manslaughter. It is almost unnecessary to observe, That whether the Remedy against the penal Consequences of Actions, committed without Intention, was in Form of an Absolvitor upon the Trial, or by having Access to a City of Refuge, it is the same Thing: The Question is, What was to be the Punishment that was to take Effect? If the Punishment was to be stop'd in that Form, by flying into a City of Refuge, the Principle of Law is the same, as if the Effect had been to be stop'd in any other Way. And just so, as we will afterwards have Occasion to notice, it is the same Thing as to our Law, whether the Manslayer was to be safe, by flying into Gyrth or Sanctuary, according to the old Law, or now to be safe by a judicial Absolvitor or Restriction of the Punishment. And just so with Regard to the Law of neighbouring Nations; it is all one, whether a Man is to be freed by Benefit of Clergy, or such other Form, if he is to be free. The Foundation Question is only, What was the Punishment, that necessarily, *cum effectu*, falls to be inflicted upon a Homicide of such or such a kind; and, as in this Case, upon a Homicide committed without Forethought or malicious Intention directed against the Person that hath suffered? And therefore, if by the *Mosaic* Law, one in the Pannel's Circumstances was to have the Benefit of a City of Refuge, the Argument concludes, That by that Law, he would not have been subjected to the Pain of Death. Indeed we believe we will be able to go a little further, to show your Lordships, That according to the Opinion of the most learned Interpreters and Doctors of the *Jewish* Law, the Benefit of the City of Refuge was scarce necessary, in such a Case as that which is now before you.

In the 19 Chap. of *Deuteronomy*, The Cities of Refuge are appointed to be separated in the midst of the Land, that every Slayer may fly thither; *And this is the Case*, (says the Text) *of the Slayer which shall fly thither, that he may live;*
whose

whoſo killeth his Neighbour ignorantly, whom he hated not in Time paſt; or, as it is ſaid to be more literally in the Original, *from Yeſterday the third Day*. By this Text your Lordſhips ſee, thoſe two are conjoyn'd as explicatory of one another, *Ignorantly, whom he hated not in Time paſt*; and ſo the Word *ignorantly* is put in Oppſition to *Hatred in Time paſt*, and by that Means the Senſe is plain, that by *Ignorantly* is not mean'd, without knowing that he kills his Neighbour, but without a Fore-knowledge, a Foreſight, a former Ratiocination and Deſign; in which Senſe, *Knowledge* is moſt frequently taken, becauſe it is impoſſible to maintain, that if a Man *ignorantly* kill his Neighbour, even whom he hated before, taking the Word *ignorantly* in that Senſe, of his not knowing that he kills him, or killing him by mere *Accident* without his Knowledge, can be liable as a Murderer, becauſe it is impoſſible to conjoyn even *previous Enmity* with *accidental ignorant* killing, ſo as to make out a Crime of Murder. That were exceeding inconfiſtent with every Principle of Reaſon, far more with a Law, flowing from Infinite Perfection. But then, the Matter is fully explain'd by 11th Verſe of that ſame Chapter, which determines when a Man is not to have the Benefit of the City of Refuge; *But if any Man hate his Neighbour, and ly in wait for him, and riſe up againſt him, and ſmite him mortally that he die, and flyeth into one of theſe Cities, then the Elders of the City ſhall ſend and fetch him thence, and deliver him into the Hands of the Revenger of Blood, that he may die*. Here are both Sides of the Queſtion put, the one fully to explain the other; the laſt to explain what is mean'd by *ignorantly* whom he hated not in Time paſt. The laſt Text does by no means ſay, that if a man ſmites his neighbour whom he knoweth, altho', without Hatred, and without lying in Wait, and without riſing up againſt him, that he ſhall ſurely die; but, on the Contrary, puts the Iſſue of his dying, upon his hating of him whom he killed, and upon his riſing up

against him whom he did kill ; and upon his lying in Wait, that is, in other Words, upon his designing to take his Opportunity from a premeditated Malice. For indeed, the Meaning cannot be that of a formal lying in Wait, or lurking in a Passage where the Person was to pass ; but he who *designs* the Thing, and takes his Opportunity, lies in Wait, in the plain Sense of the Text. Besides, the Word *Ignorantly* very plainly imports and carries under it that Case of a Man's killing, by *Misadventure*, one whom he did not intend to kill, that is plainly Ignorance, as to him who was killed ; and yet it will be true, That if he designedly kill one in Place of another, mistaking the Person, but designing to kill that Person, as supposed to be the other, he does not ignorantly kill the Man whom he does slay, he kills him knowingly, altho' he mistake the Man.

NOR is it of any Importance, That the Examples immediately subjoined in the 5. *Ver.* are Instances of Slaughter intirely accidental ; and where the Slayer did really not know that he killed ; that is an Example, but not an Example *exhausting* the Rule, which the 11th *ver.* fully clears, as not extending the Capital Punishment, to all who came not under the Description in the 5th. *ver.* but to those alone who *bated their Neighbour, lay in wait for him, and rose up against him.*

AND tho' this is plain enough from that Part of the Law, yet the Matter is indeed more fully explained, in the 35th *Ch. of Numbers*, where there is an other Ordinance as to Cities of Refuge, and they are appointed to be Six ; and the general Rule is set down, *That every one that kills any Person unawares, may fly to those Cities.* Nothing can be plainer, than the Meaning of killing *unawares*, that is without Deliberation, unexpectedly, without Forethought, *ex improviso, ex inconsulto* ; these are all synonymous, and accordingly the *Septuagint Translation* so renders the Words, *αὐθις*, that is *incoluntarily* ; and so likewise the

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Jewish Doctors have explained it, as will afterwards be noticed.

AFTER this, the Text goes on with an **E**largement or Ampliation of that general Law, *And if he smite him with an Instrument of Iron, so that he die, he is a Murderer, &c. And if he smite him with throwing a Stone, wherewith he may die, and he die, he is a Murderer, &c. Or if he smite him with an Hand Weapon of Wood, wherewith he may die, and he die, he is a Murderer.* These are the Ampliations, but then follows the Limitation in the 20th Ver. *But if he thrust him of Hatred, or hurl at him, by lying of Wait, that he die, or in Enmity smite him with his Hand, that he die, he that smote him shall surely be put to Death, for he is a Murderer, &c.* Here is the Limitation, He that killeth or thrusteth with an Iron Weapon, is a Murderer, under the Limitation introduced by the Particle *but*, as an explicatory Exception to the Generality of the Rule, *But if he thrust him with Hatred*, that is, in other Words, That he is a Murderer, if he thrust him in Hatred; and therefore, Commentators refer from this Text, to the other in *Deuteronomy*, already cited for Explication of this, where it is statuted, That if a Man hate his Neighbour, and rise up against him, and smite him; whereby they plainly understand, thrusting him of Hatred, as the same with rising up against him, and smiting him with Hatred, so as to comprehend every Manner of killing with any Weapon, and consequently that this is not a distinct manner of killing, from what is expressed in the 16th Ver. but a Quality adjoined to the Manner of killing, so as to make it capital, *viz.* That it must be done in Hatred. And this is yet more clearly explained by the 22d and following Verses, where the Opposition is stated betwixt thrusting suddenly and of Enmity, with a direct Reference to the 16, 17 & 18. Ver. *But if he thrust him suddenly, without En-*
mity

mity, or hath cast upon him any Thing, without lying in Wait, or with any Stone, wherewith a Man may die, seeing him not, and cast it upon him that he die, and was not his Enemy, neither sought his Harm, then the Congregation shall judge, &c. and shall deliver the Slayer out of the Hand of the Avenger of Blood. There all the three Methods of killing beforementioned, are referred to; Thrusting, properly applicable to the killing with a Sword, but without Enmity; casting any Thing upon him, without lying in Wait, or Forethought, or with any Stone, wherewith a Man may die, the very Thing expressed in the 17 Verse, and from which he is deem'd to be a Murderer; yet, if he was not *his* Enemy, neither sought *his* Harm, he is not a Murderer, he is not to die, but to be delivered from the Avenger of Blood. So that these three last Verses are a plain Limitation of all that went before; the Instrument, whatever it was, was to raise a Presumption, if a mortal one; but yet, if it appear, the Person was not *thrust* or *hurled* at, or *smitten* in *Enmity*, &c. the Slayer was to be delivered from the Avenger of Blood.

NEITHER can it stumble your Lordships, That, in the 22d Ver. are these Words, *Seeing him not*, as if this were one of the Requisites necessary for the Slayer's Safety, that he did not see the Man whom he thrust at, or killed with a Stone, tho' not done in Enmity: For, *First*, 'Tis impossible to imagine, That the Words, *Seeing him not*, however they might refer to the Case of throwing a Stone, can have any Reference to the Words, Thrusting without Enmity: How can a Man thrust at him whom he seeth not? or how can he smite him whom he seeth not, in any proper Sense of Smiting? and therefore, 'tis plain, That, as to the *Thrusting*, the only Limitation is, that it be done without Enmity. But, *2do*. Your Lordships will observe, That the Word *Him* in that Sentence, *Seeing him not*, is not at all in the Original; it is an Adjection of

of the Translators; and as such, is distinguished in different Characters, in any correct Editions of our Bibles, and indeed, is an erroneous Adjection; the Words should be only *Seeing not*; and perhaps the Translations ought not at all to be by the Participle *Seeing*, but according to the *Idiom* of the *Latin* Language, by an Adjective, such as *improvidus, imprudens*, or the like, and according to our Language, by a Substantive and Adverb, such as, *without Foresight*; and so the Septuagint does translate it in these Words *ἐκ εὐδίας*, which, in our Language, is directly without Foresight, that is, without Premeditation or anterior Design to give the Stroke. And so the Sense comes out, That where a Thrust or Blow of that Kind is given, without Enmity, Foresight and Premeditation; or, in other Words, *sine Dolo*, that there Death was not to follow, but the Slayer to have the Benefit of the City of Refuge. And that the most ancient Lawyers, and *Jewish* Doctors themselves, have understood the Scope of the *Mosaic* Law to be such, is the next Point we are to endeavour to show your Lordships.

And in the first Place, we beg leave to refer to an ancient Treatise, called *Mosaicarum & Romanarum legum Collatio*, last published by the learned *Schulting*, with his own Notes upon it, in the first *Tit.* of which, *De Homicidiis Casu, V. voluntate, § 5.* are these Words, *Item de Casualibus homicidiis Moites legaliter dicit, Si autem non per inimicitias immiserit super eum aliquod vas non insidians, vel lapidem, quo moriatur, non per dolum, (your Lordships will please mark those last Words) & ceciderit super eum, & mortuus fuerit, si neque inimicus ejus, &c. liberabitis percussorem.* Here is directly set down, in Way of Paraphrase, the Sense of the 23d *V.* of the 35th *Chap.* of Numbers, before cited, and in Place of these Words, *Seeing not*, the Paraphrase of this ancient Collat., is exprest by these Words, *Non per Dolum*, which shows
what

what Understanding he had of the Words, directly congruous to what we have above set down ; and, as we apprehend, to the Septuagint Translation ; and this Paraphrase the Annotator approves of, as the just Meaning of the Text.

But we beg Leave to give your Lordships another great Authority, who founds his Opinion upon the Notions of the *Jewish* Doctors, or rather sets forth what they all agreed on to be the Import of the *Mosaic* Law on this Head, and that is the great and learned *Selden*, in his Treatise *De jure naturali & gentium, juxta disciplinam Hebræorum Lib. 4. Cap. 2.* The Title of which is, *De homicidio involuntario, seu quod casu factum aut errore.* There the learn'd Author takes Notice of all the Texts upon this Subject, and of the *Jewish* Doctors who had wrote upon it, whose Names we need not trouble your Lordships to repeat, but refer to the Quotations *Selden* makes. That learned Author takes Notice of three Sorts of Homicide, which he and the *Jewish* Doctors reckoned to be *involuntary*, according to the *Mosaic* Law, and not to be punished with Death. The first is, what is *merely accidental*. The 2d is, where the Killing was *not* merely accidental, but, as he expresses it, *prope accedens ad violentiam*. The 3d we beg leave to set down in his own Words, as coming up directly to our Case. *Tertia autem homicidii involuntarii species est, ubi qui alium occidit ex errore quidem aut ignorantia, quæ tamen prope accedit ad id quod spontaneum est, seu voluntarium ; veluti ubi quis alterum occidere volens, alterum Factu aliterve perimit, aut ubi Factu sive saxi sive teli in hominum Cætum, cujus nec ignarus qui jecerit sive occisus ; adeoque intervenerit culpa latissima. Ex tribus hisce homicidii involuntarii speciebus, nulla est quæ morte ex Sententia forensi ordinaria, sive in Ebræo aliove Circumciso, sive in proselyto domicilii, aut Gentili alio puniretur. Nam in Universum pronunciant, homicidam nullum, seu qui*
non

non sponte scelus patiret, sic foro puniendus. Yea, he goes further, That in this last Case, according to the *Jewish* Doctors Opinion, there was no need of going to the City of Refuge, for that the Avenger of Blood had not a Power, in that Case to kill.

WE apprehend, nothing can be more direct or strong to the present Case, than that Authority which is laid down, as the universal Opinion of the *Jewish* Doctors, which we hope does deserve some Regard in the Interpretation of the *Mosaic* Law.

AND this naturally leads us further to observe to your Lordships what we insinuated before, that the Question started by *Roman* and *Modern* Lawyers, how far a Person that intends to kill one Man, is liable to the Pain of Death if he kill another, hath no Foundation in the *Mosaic* Law, either from the Texts, or the Opinion of those *Jewish* Doctors. As to the last, your Lordships see, that *Selden* from them, directly states the Case, *ubi quis alterum occidere colens, alterum jactu altere perimit*; and he and they determine that to be an *involuntary Homicide* not punishable with Death; and we apprehend, that in this, they are founded in the Words of all the Texts, *If any Man hate his Neighbour, and ly in Wait for him, and rise up against him, and smite him mortally, that he die*, not one Word here of rising up against one and killing another; not a Word of hating one, and in Consequence of that Hatred killing another: That was a Case which did not fall under that Law: The Hatred and the rising up, was by that Law, to be against the Man who was killed; If another by fatality happen to be killed, that was a different Case, it was an *unvoluntary Homicide*, the Crime there was not the killing, but stood upon the rising up against him who was not kill'd, and so the Punishment was for Invasion but not for killing. The Text in the Book of *Numbers* are all to the same Purpose. *If he smite him who is killed of Hatred, or burl at him by lying of wait that*
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be die, or in Enmity smite with his Hand that he die, &c. where all the Rules are still directed towards the Person alone that is killed; and that of killing another, when the Stroke was not designed at him, is quite left out of the Case: And the Application of this Reasoning to the present unhappy Accident, is too evident to need Enlargement. If it appear that the *Push* was aimed at *Bridgeton*, that the *Enmity* was against *him*, and not against the deceased-Lord; then, whatever be the Constitution of the *Roman* or more modern Laws, the present Case is quite out of the Description of the *Mosaick* Law concerning this Article of Manslaughter.

WHAT hath been already said at so great length, does fully obviate what is offered in the Pursuers Information in way of Answer. It is true, that the general Rule in the Divine Law is, *That who so sheddeth Man's Blood, by Man shall his Blood be shed*; and so by the Sixth Commandment, the Prohibition is general, *Thou shalt not kill*: Yet even the Commandment it self admits of Exceptions; such as, killing in Self-defence, and killing in Execution of Justice, and killing in Prosecution of just War, and the like. The other Rule likewise admits of Exceptions, not so as entirely to justify the Killing, and to make the Act lawful, but yet so as to excuse from the Pain of Death. The Texts already noticed are express, that a Man's Blood may be shed, and yet the Blood of the Shedder not be required on that account. The Question is, Whether this misfortunate Pannel's Case comes not under the Exceptions? and that we have already discussed.

THE Position, "That by the Law of *Moses*, Death of a Suddeny was plainly capital, and that the Slayer had the Benefit of the City of Refuge only where the Slaughter was by mere Misfortune," is assumed without sufficient Foundation. 'Tis plain, that he who thrusts without Enmity, does not kill the Man by mere *Casualty*: The Act from which Death follows, is a voluntary Act; altho' without Enmity: And altho' the Killing is involuntary, and so can never be said

said to be merely casual in the Sense the Pursuers would take the Words; neither are the Words in *Exodus*, *If a Man ly not in wait, but GOD deliver him into his hand*, in the least contrary to what hath been advanced: For it is most properly said, that where the Act is without the Design of the Killer, without Enmity, and without Hatred; that there, in so far as concerns the Killing, GOD hath delivered the Man into the hand of the Slayer. The plain Meaning is, That where a Man is killed, not with *Design*, but that the Thing happens by the over-ruling Hand of Providence permitting Things of that kind, in his sovereign Wisdom, and from his supreme Power; that there the Person is delivered to Death by the over-ruling Hand of GOD. And where could ever this be more properly applied, than on the present melancholly Occasion, when the providential turning about of the unfortunate deceast Lord, occasioned his receiving the fatal Wound?

It is likewise a Position assumed without Reason, "That
" wherever a Man was killed by a mortal Weapon, that was
" Murder by the *Mosaick Law*." We hope we have already demonstrated the contrary. If Enmity and Forethought was required, (and we need only repete that one Text which expresses the killing a Man with a Stone, wherewith he may die) there the Text declares the Stone to be a mortal Weapon; yet for all that, in case of the Circumstances mentioned in the other Verse, the Slayer was not to die, but to be delivered from the Avenger of Blood: And this single Consideration must be sufficient, to refute such a Position. Is it not possible for a Man to use a mortal Weapon, where there is no Enmity, nor Design to kill the Person who is slain? If it be possible, as it certainly is, then can we imagine that a Law, so perfect as the Divine Law it self, could make a Man guilty of Murder because of the Use of such a Weapon, where he really intended no more Harm than a Man that used a Weapon of another kind? besides, that in truth every Weapon is a

mortal Weapon with which a Man may be killed : And therefore, to imagine that the Divine Law laid such a Difference betwixt an Instrument of Iron and one of another kind, is certainly to go too far. The Law of God has put the Matter upon a much juster Footing, to wit, the *Intention* of the Person ; which alone can distinguish his Actions.

THE Pursuers also say, " That tho' the Argument is good, " That wherever the Benefit of the City of Refuge was not competent, there the Crime was capital ; yet it does not follow, that where the Power of the Laws were suspended by the *jus asylii*, that the Punishment is not to be capital in a Country where the *jus asylii* takes no place."

BUT, with Submission, this is no solid way of arguing : The Question hitherto treated is, what was the Law of *Moses*, with regard to Punishments in the case of Manslaughter ? If the Punishment in any case was not capital, because of the privilege of the *Asylum*, the Conclusion is just ; That the All-wise God did not intend such Punishments should be inflicted for such an Offence, and the *Form* of granting the protection from the Punishment, does not alter the *Substance* of the Law.

THE *Next* point undertaken to be illustrated is, That Manslaughter, under such Circumstances as occur in the present Case, was not by the *Common Law* punishable by Death : And this Argument must indeed be divided into several Branches, such as, *1mo*, That *culpable Homicide* was not so punishable, and that Homicide committed upon such *high Provocation*, as was here given by *Bridgeton*, could amount to culpable Homicide only. *2do*, That by that Law, the deceased Lord not having been intended to be killed, but the *Invasion*, whatever it was, intended against another ; the killing the Earl was *casual*, or at worst *culpable*, not punishable with Death.

AND as to the *First* of these Points, we shall not trouble your Lordships with Infinity of Laws and Opinions of Lawyers

yers that might be adduced upon the Point, but only take Notice of some of the most remarkable, and which seem most apposite to the present Case. And in the *First* place, The Foundation of the *Roman* Law on this point appears to have been laid down as early as the Days of *Numa*: For the *Roman* Writers take Notice of a Law of his in these Words, *In Numæ legibus cautum est, ut si quis imprudens hominem occidisset, pro capite occisi & natis ejus in concione offerret arietem.* This Law is taken Notice of by *Pithæus* in his Annotations upon the forecited ancient Treatise, comparing the *Mosaick* and *Roman* Law, with regard to this head of Manslaughter, as agreeing precisely with the Law of *Moses*; and the plain Meaning of it is, That where a Man kills another, altho' culpably, yet if it be *sine dolo per imprudentiam*, he is not to suffer Death, but to make an *Assythment* to the nearest Relations of the Person killed: And the same Treatise takes Notice of a Rescript of *Adrian's* to the same purpose, directed to *Taurinus Ignatius*, approving of a Judgment given in the case of one *Marius Evaristus*, whereby the *Proconsul* had mitigated the punishment of Manslaughter upon that Ground, That suppose it was done *per lasciviam*, and culpably, yet it was *sine dolo*. The Words of the Rescript are, *Pœnam Marii Evaristi rectè, Ignate Taurine, moderatus es ad modum culpæ, refert enim, & in majoribus delictis consulto aliquod admittatur an casu; & sane in omnibus criminibus distinctio hæc pœnam aut justitiam provocare debet aut temperamentum admittere.* And *Schulting* in his *Annotations* explains what is meant by *CASU* in these Words, *Per CASUM hic intelligitur fieri quod non fit dolo, quomodo & quod impetu fit, casu dicitur fieri, l. 1. § 3. ad leg. Cornel. de Siccar. Ubi pro causa, editiones veteres & glossam rectè haberi casu certissimum est.* Which, by the by, shows how erroneous the Pursuers Interpretation of the Words *CASUS* or *CASUAL* is, when they would restrict them to what is done by mere Accident.

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THE general Rules of the Civil Law are plain on this point, That it is the *animus qui maleficia distinguit*; That there can be no Murder, *sine animo occidendi*. But these general Topicks need not be insisted on, where the Texts themselves are so exprels, such as not only these already mentioned, but even that *l. 1. § 3. ad leg. Corn. de Siccar. Divus Adrianus rescripsit, eum qui hominem occidit, si non occidendi animo hoc admisit, absolvi posse*. And a little after, *Et ex re constituendum hoc, nam si gladium strixerit, & in eo percusserit, indubitate occidendi animo id eum admisisse*. But then he adds the Exception, *Sed si clavi percussit, aut cuccuma in rixa: quamvis ferro percusserit, tamen non occidendi animo, leniendam pœnam ejus qui in rixa casu magis quam voluntate homicidium admisit*. It is true that the Pursuers, and indeed several of the Doctors, endeavour to turn this Text the other Way, by a plainly erroneous Interpretation and wrong pointing of the Text. They pretend, *That where a Wound is given by a Sword, there the animus is undoubtedly presumed*; and so far right as to the Rule. But then the Law sets down the Exceptions, *First*, If the Stroke be *clavi aut cuccuma*, suppose these be mortal Weapons wherewith a Man may die, yet because they are not Instruments expressly made for Death, the Presumption is, that *aberat animus occidendi*, unless Circumstances make it appear otherwise. Then the *Second* Exception is *in rixa, quamvis ferro percusserit*, although a Man strike with a Sword, yet if it be *in rixa*, suddenly, or upon a provocation given, *tamen non occidendi animo, leniendam pœnam*, because *in rixa, casu magis quam voluntate homicidium admisit*. Those Doctors indeed who go wrong in the Interpretation of this Text, pretend, That the Meaning of *quamvis ferro* is not, altho' he strike with a Sword, but would make the Meaning to be, *Altho' he struck with an Instrument of Iron*, and so make the Word *FERRUM*, and also those Words *IN RIXA* refer to other Words, *clave aut cuccuma*; so as that the Sense should be,

if

if a Man strike *clave aut cucuma in rixa*, altho' these be Instruments of Iron, he is not presumed to have had the *animus occidendi*. But, with Submission, as both the learned *Noodt* and *Schulting* observes upon that Law, the Interpretation is strained, and indeed illiterate; for the Word *ferrum* is never used in Law in that Sense, but always does signify a Sword; and to the Expression is the same, but ornately repeated in other Words, as if the Emperor had said; *in rixa quamvis gladio percusserit*: And so the Sense is, that the *animus* is in general presumed from the using a Sword, that it is not presumed where the Instrument is not an Instrument made for Death; but if the Killing happen *in rixa*, the *animus* is not presumed, altho' the Stroke be given with a Sword.

AND this is likewise the Opinion of the learned *Grotius*, in his *Annotations* upon the Text in *Numbers* above cited, ver. 16. which in the *Latin* Translations is rendred, *Si quis ferro percusserit*, on which *Grotius* hath this Note, *Mos Ebraeorum multis verbis rem circumloqui sensus est mortis esse pœnam qualicunque telo quis hominem occiderit ex telo præsumitur malum concilium, nisi contrarium appareat*. There your Lordships see that Author's Opinion is as we plead, That the using a mortal Weapon presumes the Design, but not *præsumptione juris & de jure*, for he adds, *nisi contrarium appareat*.

THE Rescript of the Emperor *Antonine* is likewise as express on this Head as can be, l. 1. Cod. de siccar. *Frater vester rectius fecerit, si se præsidii provinciæ obtulerit. Qui si probaverit, non occidendi animo hominem à se percussum esse, remissâ homicidii pœna, secundum disciplinam militarem sententiam proferet: crimen enim contrahitur, si & voluntas nocendi intercedat, ceterum ea quæ ex improvise casu potius quàm fraude accidunt, fato plerumque non noxæ imputantur*. Here the Emperor plainly sets down these two Things, First, That *pœna homicidii est remittenda, si animum occidendi non habuerit*. 2do, That where the Thing is done *ex improvise*, there

there there is no *animus*; that 'tis to be looked upon as done *casu*, by Fatality, rather than Crime; but nevertheless, that in such a Case there may be an arbitrary Punishment.

THE DOCTORS of the *Roman Law* seem to be unanimous on this general Point; *Carpzovius* one of the severest Criminalists is most express upon it, *Cessat porro pœna ordinaria homicidii, si culpâ vel casu fuisset commissum homicidium*, and goes on, *quod aded verum est, ut in homicidio lata culpa, dolo non equiparetur*. *Clarus* is likewise as express upon this general Head, and such Shoals of others are by them quoted and referred to, that it were vain to repeat their Names, or trouble your Lordships with quoting their Words. We don't know that any Lawyer of Reputation differs upon the general Point.

BUT then indeed the Question comes, What is culpable Homicide; and whether the present Case falls under that Description, which is next to be illustrated. And here we humbly insist, That where the Homicide is committed upon a sudden Quarrel, and Provocation given, especially by *real Injury*, and that Quarrel begun not by the Killer, that this is no more than culpable Homicide: And for this in the First Place, We oppose the Law already cited, *in rixa quamvis ferro percusserit*. And to the same Purpose is the first Law, § 5. ff. *ad senat. consul. Turpilianum*, the l. 2. *Cod. de abolit.* and the § 2. l. 16. *de pœnis*; the Words of which we shall not trouble your Lordships with repeating, because they are the common Texts founded upon by the Doctors on this Head. We have likewise for us, the Authority of all the ancient moral Philosophers, such as *Aristotle*, *Plato*, *Plutarch*, and many others, likewise commonly taken Notice of by the Lawers on this Subject. It is true, some of the severest Criminalists, such as *Matthæus* and *Carpzovius*, don't admit the Rule in general; but still they admit as much as is necessary in the present Question; they don't allow, that where the Killer is *auctor rixe*, that he is at all to be

be excused, altho' the Killing happen *in calore iracundiae*; but then most of them do admit it, if the Killer be not the *author rixæ*, but be the Person provoked, to whom a just *Provocation* has been given, especially by a *real Injury*; and so particularly *Carpzovius*, one of the severest, after he has argued at Length against the general Point, concludes in his *questio 6. §§ 14. and 16. Nihil quoque adversatur regula adducta, quod scilicet delictum ira commissum, mitius puniri soleat; quia hæc regula de ira ex justa causa proveniente accipienda est: duplex etenim ira est, alia ex justa causa provenit, quæ si non in totum, tamen ex parte excusat, ut delinquens mitius puniatur; alia verò non provenit ex justa causa, quæ in nihilo excusat: Then he adds, Hæc distinctio communiter recepta est ab interpretibus, and cites severals; and then concludes, Si ergo justa causa calorem iracundiae præcedat, veluti si quis ab alio fuerit provocatus, aut alio modo offensus, tunc is qui ira & intenso dolore permotus, provocantem seu offendentem interficit, absque dubio à pœna ordinaria liberabitur; secus verò si quis, absque justa & probabili causa iratus aliquem occidat, de quo casu nos hic loquimur, qui pœnæ homicidii ordinariæ neutiquam est eximendus; and then takes Notice, that the Practice in the Court of *Lipswick* is agreeable to this.*

THERE is an adjudged Case very apposite, published in a Book, called, *Alphonfi Villagut Neapolitani Consultationes Decisive*, very learnedly resolved. It is the *Decisio 29.* We shall state the Case in the Words of the Author; *Quidam nobilis Ragusinus fuisset verberatus, extra (sed prope) Ecclesiam Sanctæ Crucis Castri Gravosæ, à quodam alio nobili Ragusino, in eodem pacto evaginavit pugionem contra dictum verberantem, ac in fugam jam conversum & ipsum insequens, unico vulnere sibi inflicto in dicta Ecclesia (quam ille ingressus fuerat) dictam Ecclesiam egrediens sese in fugam dedit, & cum dictus verberator, ex dicto unico inflicto vulnere intra dictam Ecclesiam mortuus esset. The Case came to be tried, at least the Questions upon it, to be resolved by the said *Alphonfus*; where several Questions*

ons occurred, but those which are most applicable to the present Case, are two; first, *An hujusmodi homicidium in Ecclesia perpetratum fuerat dicendum voluntarium nec ne, eo quod dictus nobilis insecutus fuisset illum jam cessantem à verberibus inferendis, ac sic unico vulnere inflicto interfecisset.* The second Question is, *An dictus nobilis prædicto modo ac de causa violans dictam immunitatem ecclesiasticam, veniat in foro seculari, & ecclesiastico pœna ordinaria plectendus, vel solum mitiore pœna.* The Resolution upon the first Question is, That tho' at first View the Homicide might seem voluntary, *eo quod dictus nobilis, nemine ipsum compellente, fugientem hominem vulneraverit, nihilominus nullo pacto fore judicandum homicidium voluntarium, aut pro tali dictum nobilem puniendum.* The Reasons for this Resolution, are set down with great Learning and Judgment; but are so long, that 'tis impossible to repeat them; First, They are taken from the Definition of voluntary Homicide. 2do, From the Texts of the Roman Law, and the Opinion of Doctors. 3tio, From that Particular, that the Nobleman had been immediately struck before; on which the Words are remarkable, *ex hoc ergo articulo, appertissime elicitur homicidium hujusmodi fuisse casuale, & non voluntarium, nam nulla mora interjacente, evaginato pugione, ipse nobilis baculo percussus insecutus fuit dictum percussorem jam fugientem, & hoc pro honoris proprii redemptione, ut sic se tueretur ab injuria corporali recepta ex verberibus:* After which follows a long Reasoning, all in the Pannel's favours. And this Case we take the more notice of, because the Pursuers pretended to make a Distinction betwixt the Case of a Wound given the very Moment a real Injury is done, and the like given after the Injurer has desisted from beating, and retired to some Distance; but there is no Difference, except the Interval be so long, as it can be supposed the Thought of the Person injured was cool. The other Question is likewise resolved in favour of the accused, that in such a Case, not the ordinary Punishment, either Ecclesiastical or Civil, ought to take Place, but only the *Pœna mitior*, and confirmed by very strong Reasons, which we cannot recite, but refer to.

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Amongst other Authors that might be cited for supporting this Opinion, is the learned *Voet*, in the very Section cited by the Pursuers, *ad tit. ad leg. Com. d. Sic. n. 9.* Where after he has said what is cited for them, that one killing another who has provoked him only by a verbal or slight Injury; *vix, est ut ab ordinaria pœna absolvendus sit.* He adds, That if the Provocation was by an atrocious real Injury, *that* would be sufficient to mitigate the ordinary Punishment; and to confirm that, cites *Matthæus, Belichius, &c.* And the Reason given by these Authors for making this Allowance, in case of just Provocation, is exprest in these Words by *Gotofred, ad l. 17. d. 1. Quod ei sit ignoscendum, qui provocatus se ulcisci voluit, quique justum dolorem prosequitur.*

AND indeed we apprehend this Opinion is founded in the first Principle of Nature; for scarce any humane Constancy can suffer such high *real Injury*, without the Passions being inflamed; and altho' Killing is no doubt an Excess in the Retortion of a real Injury, yet still it is but an Excess, and the Injury shows the Thing done without Design; and therefore, because of insuperable humane Weakness, the Punishment falls to be mitigated: And the Application to the present Case, as we apprehend, is obvious; *Bridgeton* had given the highest Provocation, not only by a Tract of verbal Injuries and Endeavours to pick a Quarrel, but had committed the most provocking *real Injury*, to throw a Gentleman over Head and Ears in a dirty Puddle, in the Middle of a Town, and Sight of so many On-lookers; no Injury could be more provocking; yea indeed there was more in it than an Injury only: One that was able to throw the Pannel into the Puddle in that Manner, was likewise able to have suffocated him there; the Pannel had no Reason to expect otherwise, and therefore no wonder if he betook himself to his Sword; and the other Circumstance noticed, that *Bridgeton*, immediately upon the doing the Thing, endeavoured to draw, and make himself Master of my Lord *Strathmore's* Sword, gave the Pannel Ground to expect the worst; and so it may be doubted, if he was obliged to wait till *Bridgeton* should have an

Opportunity to give him the Blow, even with a mortal Weapon: And when this is considered, the Fact goes further than a Retortion of the *bighest Injury*; the Pannel was in some measure put upon his *Defence*; and granting that his pushing at *Bridgeton* was an Excess, yet still that Excess falls only to be punished, *pœna extraordinaria*.

ALL Lawyers distinguish Excesses of that Sort into three Kinds, that of *Time*, *Place*, and *Weapon* that is used; and Excess in Point of Time is punished even with Death, where the Interval is great, because that Interval presumes Fraud and Deliberation; but here was no Excess of Time, the Thing was done *ex incontinenti*, when the Injury was fresh and recent. There is likewise Excess in Point of Place, when the Injurer is allowed to retire to a considerable Distance from the Place where the Injury is given; and this is in some measure coincident with the other, because it implies an Interval of Time; yet if it be not great, the Lawyers hold it to be only punishable arbitrarily. And then the third is the Excess in the Use of the Weapon, where there is no Interval of Time or Place; and that is always agreed to be punishable only arbitrarily, where the Provocation is high.

FROM what is said it seems plain, That if *Bridgeton* had received the Thrust, the Homicide would have been *culpable* only; and so it remains to be considered, if the Case comes out worse for the Pannel, because it was my Lord *Strathmore* that received the Wound, and not *Bridgeton*; and we apprehend it does not, but on the contrary, that this gives a great *Strength* to the *Defence*: And that because, *imo*, The Push being designed at *Bridgeton*, shows that there was no Malice at my Lord *Strathmore*, neither premeditated nor presumed from the giving of the Wound; for admitting it to be true, that in an ordinary Case the giving a Wound with a mortal Weapon, presumes the *Dole* or malevolous Intention, yet that can never be, where the Push is pointed at *another* than *him*, who by Fataality receives it: And so the Case comes out thus, That the Pannel in making *one Push*, could not design it at *two Persons*; and so if he designed it at *Bridgeton*, 'tis impossible to say, he had a Design
against

against my Lord *Strathmore*. It is plain in the Nature of the Thing, that the *Design* tho' presumed from the giving the Wound, yet in Point of Time it *preceeds* the actual receiving of the Wound, altho' that Preceeding or Precedence be but momentary; and therefore, if in the very *Act of Pushing*, the Design appears to have been against *Bridgeton*, it excludes all Pretence of any *animus* against another who received the Wound by *Fatality*, in the very *Moment* that the *Design* was pointed against the other.

AND here your Lordships will likewise observe, that there can be no *animus occidendi* presumed at all against any Man, not even against *Bridgeton* himself, because the drawing a Sword, and pushing at a Man with it, does not of it self presume a Design to kill the Man pushed at, except the Wound and Death *actually follow*; for it is from the *Event* of the Wound, and Death following alone that the *Intention* is presumed; therefore since Death did not happen to *Bridgeton*, the Law cannot presume an *Intention to kill* him, since the Foundation of the Presumption is removed, or did not happen. If the Blow had *missed* him, or had not killed but wounded him, the *Intention* would not be presumed; and therefore it cannot here be presumed, as the Case happened; for there is no such Presumption in Law, as that killing one presumes a Design to kill another, except where it appears that the Slayer killed one Man by Mistake, taking him to be another; as for Instance, killing *Caius* in the Dark, when the Killer really believed him to be *Titius*, there indeed the killing of *Caius* presumes the *Intention* of killing *Titius*, altho' he was not actually slain; and therefore in that Case the Killer is indeed guilty of Murder; but 'tis quite another Case, where one Man is killed, not by Mistake for another, but by *Fatality*, when the Push was intended at another, whom the Killer *knew*, which is the Case in hand; and therefore we do humbly insist, that it cannot be said there was an *Intention to kill Bridgeton*, since his Death did not follow, neither can it be said there was an *Intention to kill the Earl of Strathmore*, because tho' his Death did most unluckily happen,
yet

yet the *initium* upon which the *Intention* must be founded, did not happen, the *Pusb* being made at *Bridgeton*; for those two must always *concur*, the *Pusb* made at the Man who dies, and the *actual Death*; and where it happens otherwise, the Death is a *meer Fatality*, not *intirely innocent*, because the Killer was so far Faulty in invading the other; but then it is no more than an *Invasion*, it is not *Murder* from Malice presumed; no Presumption of Law can get the better of contrary Evidence, the Presumption of Law may be, that where a Man is killed, he was intended to be killed, but if from the Circumstances the direct contrary appear, that there was not an *Intention* against him; this is *Evidence* which excludes the Presumption, and so there can be no Murder in the Case.

It is indeed a Case stated by the Lawyers, what should be the Consequence if a Person intending to kill one Man, kill another; and we acknowledge they are greatly divided among themselves upon the Question, a great many of the ablest of them are in all Cases clear, that where one Man is killed and another was designed, it cannot be Murder, because of the Want of an *Intention* against him, *Bartolus*, *Farinacius*, *Gomesius*, *Menochius*, and Numbers of others quoted by them are plain in that Opinion, and give an Account of several Judgments of the Courts of *Mantua* and *Naples*, and others to that Purpose, and *Farinacius* says, That it is the common Opinion, *Et ab hac sententia in judicando non esse recedendum*; and however other Lawyers may seem to differ, yet in the first Place the divine Law, for any thing that can be found in it, is on this Side, because it plainly speaks only of hating him, and rising up against him who happens actually to be killed, and mentions no such Case as deserving Death as this of rising up against one Man, and by Fatality killing another. 2do, That this was the Opinion of the *Jewish Doctors*, is plain from the Quotation already brought from *Selden*, where this very Thing of killing one Man in Place of another is made Part of the third Case stated of involuntary Homicide, and determined not to be Capital. But 3tio, Those Lawyers who at first View seem to differ, do really

really not differ, when the Cases are distinguished; for what they plainly mean is only where a Man by Mistake kills *Titius*, believing him to be *Mevius*. This we admit is capital, for Reasons before given, but not the other of killing one by Fatality, not for another, but directing the Blow at the other.

BUT then your Lordships will observe, That all Lawyers agree in this, That wherever a Man is to suffer for killing one, when he intended to kill another, that can only be where the *Forethought* and *Dolose Intention* to kill the other is certain; but not where the *Invasion* is *ex impetu*; and therefore supposing one invade another, with an Intention to hurt or *percutere* as the Lawyers call it, but without a certain Evidence that his thorow Intention was to *kill*; there supposing the Blow intended for one do kill another, the Killer can't suffer Death, and which by the by shows your Lordships that there is no such Presumption in Law as that, because the Push killed the Earl of *Strathmore*, therefore the Pannel intended to kill *Bridgeton*; for if that were Law, then the Question could never occur, but would be inept, whether a Man intending to strike one, and killing another with that Blow, is guilty of Murder, or is presumed to have intended to kill that other, at whom the Stroke was intended. We shall trouble your Lordships only with two Authorities on this Point, which are very direct to the Case; the first is that of *Berlichius*, which we the rather notice, because he seems to be against us on the general Point, after discussing which, he hath those Words, speaking of his own Opinion, he says, *Fallit, si quis aliquem non occidere, sed percutere tantum, volens, alium præter intentionem percutiat ut moriatur*. From this your Lordships see, That it is no Consequence, that because the Thrust killed my Lord *Strathmore*, therefore it shou'd be presumed the Pannel intended to kill *Bridgeton*. If that were true, that Lawyers Position from whom no Body differs, must be direct Nonsense; and therefore since there is no other Evidence of a further Intention against *Bridgeton* than *percutere*, except it arise from the Death of my Lord *Strathmore*; and that his Death cannot presume it; we are directly under the Position

Position the Lawyer lays down, that tho' my Lord was unhappily killed, yet the Pannel ought not to suffer Death, where it does not appear that he intended to do more than to push at Bridgeton at random, *percutere*, without a certain Design to kill.

But this is yet more plainly laid down by another very distinct Lawyer, *Masurius Labio*, in his Treatise called, *Homicida excusatus*, cap. 35. where treating of this very Question, he first notices, that if the Killer was *occupatus in re licita*, such as defending against any Aggressor, which in some Measure is the Case here, that then he is not liable, altho' he chance to kill a third Party: But then he goes further, *Aut etiam ut amplius dicta extendamus, reus quantumvis in re illicita occupatus, tali tamen in casu constitutus fuit, ut si Caium interfecisset, non nisi culpa reus futurus fuisset, ejusque loco, cum infelici fato Sempronius lethalem acceperit ictum, magis est ut reus hoc ipso causam suam non gravasse censi debeat: cum enim Caii internecione mortem meritis non fuisset certe imprudentia atque, in facto error magis eum a Sempronii cade excusare debet, atque Caio potius si is vel rixa auctor fuerit, vel iracundiam alterius justam provocaverit, id quod inde secutum imputandum reor.* Here your Lordships see he is stating the Case of a *rixæ*; where one had given Provocation as *Bridgeton* did, he indeed supposes that in such a Case killing the Provoker ought not to infer Death, much less, says he, the accidental killing of a third Party; and your Lordships will observe he asserts further, That the Provoker, or author *rixæ* is rather to be judged guilty of the Slaughter.

AND a little after, he comes yet closer to the present Case: *Quod si tamen Caium adversarium occidere nollet, sed illi tantum nocere, Sempronium autem imprudenter se ictui obicientem, eo ipso interemerit, tunc certe imprudentia Sempronii delictum rei aggravare non debet: si enim is moderatorem rixæ se non obtulisset, corpusque suum subito ex propinquo non objecisset, Caius à cedente forte remotior, non nisi vulnus aliamve noxam inde reportasset, unde Sempronio mors oblata est; excusandus ergo à tanto merito percussor, tunc cum occidendi animus hic non adfuisse apparet.*

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This is so apposite to the present Question, that one would think it were a Resolution on the Case: For by that your Lordships see, that notwithstanding *one's* being killed, the Author says it does not from thence appear, that there was an Intention to kill the *other*: The other, who, as being at a greater Distance, might not have been killed, might only have been hurt and wounded, altho' the Person that came unhappily in the Way happened to be killed. This is just what we have pled, That it does not appear there was an Intention to kill *Bridgeton*, because he might not have been killed, but he might only have been *hurt* or *wounded*; and therefore the Pannel ought not to suffer Death, because of the Fatality of killing the deceased Lord, *qui subito corpus suum ex propinquo objecit*. And upon all those Grounds, we humbly insist, That if *Bridgeton* had been killed, there would have been no place for a capital Punishment: But then separately, whatever be in that, That since it does not appear, (nor cannot, since Death did not follow) that there was a certain Intention to kill him, the *casual* killing of the Earl of *Strathmore* can't be punishable with Death.

WHAT has been said, fully removes any Argument that may be drawn from Sir George Mackenzie's Opinion, "That he who by Mistake kills one for another, should die:" For your Lordships see, that he speaks only of that Case, when one Man is certainly intended to be killed, but another is killed by Mistake, being supposed to be him: That is not the Case now before your Lordships.

AND in this Question, concerning the Pannel's Intention and Design, the Circumstance of his being overtaken with *Drink* is a Circumstance that assists in the Argument. We don't say, that being drunk affords a Defence for Killing; nevertheless it is a Circumstance whereby to show there was no Malice or Dole, especially against the Earl of *Strathmore*; since every body may conceive, how easy it is for a Man that is drunk, pushing at one, even to stagger upon another, or

not to have the Judgment and Presence of Mind, to draw back when that other suddenly throws himself in the Way of the Thrust.

WHAT is laid down by the Pursuers, in opposition to all this, in their Information, is so fully obviated, that 'tis quite needless to repeat their Argument; only whereas they say, "That if Killing, notwithstanding of Provocation, hath been capital, it could not have been a Doubt in the Common Law, whether a Husband ought to suffer Death who killed his Wife taken in the Act of Adultery." But we apprehend that the direct contrary Consequence follows, That if high Provocation had not afforded a Defence, then indeed there could not have been a Doubt the Husband must have died, because high Provocation was all he had to plead: But the Doubt was, Whether a Provocation of that kind, where there was no real corporal Injury to the Husband himself, was sufficient? And the Law determines that it was; and consequently establishes the Rule, That high and grievous Provocations ought to alleviate the Punishment.

THE Brocard, That *versans in re illicita tenetur de omni eventu*, affords no Argument against the Pannel in this Case; nor indeed hath it been much insisted on by the Pursuers. *First*, It is not true in many Cases. But *2do*, It holds in no Case, except with regard to Consequences or Events, that happen with regard to that Subject or Object against whom or which the unlawful Act is directed: As for Instance, If one sets Fire to a House, he is guilty of Murder if a Person happen to be burnt in that House; or if he undermine a House, he is liable for all the Goods that may be destroyed by its Fall; but he is not liable for any *extrinsic* Damage that may happen to another Subject *casually* and by Accident: And therefore, suppose it were proved, that one unlawfully invading another, without a Design to kill, might in some Cases be liable, if Death followed; yet that can only be with regard to the Person he invades, but never with regard to what accidentally

dentally happens to another Person. And so Carpzovius explains the Matter, *Qu. 1. § ult.* in these Words, *Supradicta enim (quod nempe danti operam rei illicitæ imputari debeat, quicquid fuerit præter ejus intentionem ex eo actu secutum) procedunt tantum, quantum ad subjectum, circa quod versatur ipsa malitia illicitæ operantis, & quantum ad ea quæ illi objecto per se & immediate junguntur, aut necessaria sequuntur; non autem quoad illa quæ per accidens oriuntur, à re illa mala, cui opera datur.* Besides, 'tis certain that the Brocard is no Rule at all in the Matter of Manslaughter, otherwise there never could be such a Thing as *culpable Homicide*; which 'tis plain there is.

THE next Thing to be considered, is, what *was* and *is* the Law of Scotland concerning this Matter: And *first*, as to our ancient Law, the Pursuers seem to be the first that ever disputed that according to it there was a Distinction betwixt *Slaughter* and *Murder*. Sir George Mackenzie is express upon it, *By our Law*, says he, *Slaughter and Murder did of old differ, as homicidium simplex & præmeditatum, in the Civil Law; and Murder only committed, as we call it, upon forethought Felony, was only properly called Murder, and punished as such; for which he quotes the express Statute, Par. 3. Cap. 51. K. James I. appointing that Murder be capitally punished, but chaud-melle or Slaughter committed upon Suddenty, shall only be punishable according to the old Laws and several other Acts of Parliament, to which we beg Leave to refer**; which expressly make the Distinction betwixt *forethought Felony* and *Slaughter of Suddenty*: And tho' none of all these Laws particularly express the Punishment of *Manslaughter*, as they could not well do, because that was arbitrary according to Circumstances; yet, as Sir George observes, the Opposition and Distinction is established betwixt *Slaughter*, by *Forethought* and *chaud melle*, and the Punishment of the one to be less than that of the other:

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* See an Abstract of some of these Acts subjoined to this Information.

And therefore we apprehend we may leave this Point as clear and undoubted.

THE Pursuer has endeavoured to no Manner of Purpose, to set up others of our ancient Laws, in Opposition to those observed by Sir George Mackenzie, such as the 3d Statute of King Robert I. which with Submission is nothing to the Purpose; for *First*, It does not concern capital Crimes only, but any Crime touching Limb as well as Life. *2do*, Tho' the Word Slaughter is mentioned, without adding by forethought Felony, yet the same Thing is added in other Words, when it says, touching Life or Limb, to which alone the Act relates, that is forethought Felony, because Slaughter by *Cbaud melle*, touched neither Life nor Limb. The Title of the Act is, *Men condemned to Death should not be redeemed*. But what is that to the Purpose in a Question, who should be condemned to Death, and who not.

THE 43d Chap. of the Act of King Robert III. is as little to the Purpose; for as it speaks of Hairships, Burnings, Reif and Slaughter, 'tis very plain, it means only willful premeditate Slaughter, otherwise it would follow, that not only willful Fire-raising, but burning of a House by Neglect, or *latâ culpa*, would infer the Pain of Death, which no Body ever dreamed. And the next Paragraph makes it further clear, appointing Sheriffs to take diligent Inquisition, " gif any be common Destroyers of the Country, or hath destroyed the King's Lieges with Hairship, Slaughter, &c. Can a Man be a common Destroyer by Slaughter, except where the Slaughter is supposed to be by forethought Felony? 'Tis certain he cannot; and therefore the Pursuers Procurators fall into a great Mistake in Law, when they say, that they afterwards, that gif he be ken'd with the Assize, *Si attentus fuerit per assisum tanquam talis malefactor, condemnabitur ad mortem*, must relate to Manslaughter, because the Sheriff could not judge of Murder; it is directly otherwise; if he be attainted by the Assize as such a Malefactor, that is, as a common Oppressor

pressor by Slaughter, &c. he is to be condemned to Death. This is an Exception from the Rule, that Murder was to be tried by the Justice Aire; this Law appointed it to be tried in that Way, in case the Person accused could find his *Barras* or *Borgh*, to compare at next Justice Aire; but if he could not, the Sheriff was immediately impowered to try: And by the By, this does not concern particular Fact, but concerns that general Accusation, of being a common Oppressor, like to the Case of a *Sorner*, or one habite and repute an *Egyptian*. Nor can the Lawyers for the Pannel find any Word in the Statutes of *Alexander II.* which the Pursuers refer to, that does in the least presuppose, that Manslaughter was capital in them; the direct contrary appears, that Manslayers were to be tried, whether guilty of Murder, or not; and if found not guilty, that they were to have the Benefit of the *Girth*; and accordingly *Skeen* in his Annotations, refers directly to the Acts of Parliament, which Sir *George Mackenzie* takes Notice of, establishing the Distinction, and to some of the *English* Acts to the same Purpose.

As to the Passage cited from *Skeen*, in his Treatise of Crimes, *Tit. Slaughter*; there is certainly a direct Blunder in the Printing; and instead of these Words, *or casually by Chaud melle*, probably it ought to have been, *not casually, or by Chaud melle*; for otherwise he directly contradicts himself, and cites Acts of Parliament which prove the very contrary of what the Pursuers would make him assert; yea, the very next Paragraph establisheth the Distinction in these Words, *Sua that the Girth or Sanctuary is nae Refuge to him, wha commits Slaughter be forethought Felony, ergo* it was a Refuge to him that committed Slaughter, not by forethought Felony, and saved him even from the arbitrary Punishment of Manslaughter. And *Skeen* himself, in his Explication of the Words *Chaud melle*, says it is in Latin *rixa*, *an hot sudden Tuily, or Debate*, which is opposed, as contrary to forethought Felony, and cites the Act *James I.* But how is it
 contrair:

contray in our Law, if the Effect and Punishment be the same. And upon the Word *forethought Felony*, he in like Manner makes the just Distinction, and supports it by the Authority of *Cicero*, in his Treatise *de officiis*, where he is writing as a Moralist, and not as an Orator.

THE Pursuers Answer to the 8th Act, 6th Parl. James I. is quite trifling ; for nothing can be plainer, than the Opposition there stated betwixt *forethought Felony* and other Slaughter ; and when the Act statutes, *that if it be forethought Felony, the Slayer shall die*, the Consequence is obvious, according to the plainest Rules of Logick ; *That if it be not forethought Felony, he shall not die*, otherwise the Act is absurd. And as to Sir *George Mackenzie's* Observation upon these Words, it is certainly not so accurately placed as an Observation upon that Act, because it plainly relates to the Act of *Charles II.* and therefore falls to be considered, when we come to argue the Import of that Act.

THE Pursuers Observation, by way of Answer to the 5th Act, Parl. 3. Jam. I. is intirely nought ; for if it extend the Difference between *forethought* and *Chaud melle*, to all Transgressions as well as Manslaughter, then for certain, it establishes the Distinction in the Case of Manslaughter ; and so Sir *George Mackenzie* likewise says, in his Observations on this Act, as well as in his Criminals : And as to his further Observation, that *Chaud melle* is by our present Law punishable by Death, that still refers to the Act of Parliament Ch. II. and must be examined with it.

THE Pursuers have further pled, " That the Benefit of the " Sanctuary might be competent where Crimes were capital." Which he founds upon the Statutes of *Alexander II.* But this is not worth disputing ; for if the flying to the Sanctuary, join'd with Repentance, and so forth, rendred the Crime not capital, it is all the same Thing ; that is in effect to render the Crime not capital only by another Form, but still the Substance remains, that according to the Law, the
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pain of Death was not to be inflicted: At the same Time that Statute concerning *Reifs*, whereby Repentance abfolves from the Punishment, is fomewhat peculiar, and does not at all contradict the other Laws, which make or fuppofes *chaud melle* not to be capital; and the laft part of the Statute, appointing, *That if Manfayers fly to the Kirk, the Law fhall be kept and obferved to them*, eftablifhes the Point, that if they were not found Murderers by Forethought, they were to be returned to the Sanctuary, and freed from Punishment.

THE Purfuers fay, " That after the Reformation, when " the *Jus Afylii* was in effect abolifhed, then the Distinction " on betwixt forethought Felony and *chaud melle* ceafed; " and that it was never objected, that Malice or premeditate " Design was requifite to make the Crime capital." And for this they take Notice of two Cafes, *Currie* againft *Frafer*, July 1641, and *Bruce* againft *Marfhall*, April 1644. But in the *First* place, The Procurators for the Pannel with Reason fay, That if that happened, it was an Error in Judgment; for fince the Distinction was eftablifhed by the old Laws, and that there was no Law at that Time altering or repealing thofe old Laws, the Abolition of Popery, and of the flying to the Kirk in confequence, was no Reason for judging contrary to the *Civil Laws* that were ftill ftanding; and if an Escape of that kind happened, it muft be attributed to the over great Zeal, and, if we may be allowed to fay it, a fort of Enthufiaftick Keennefs of thofe Times; and we do apprehend, that the Act 1649, and the Act of *Charles II* were intended to correct the Errors that by too great Zeal had then crept in.

AT the fame Time, as to the two Cafes cited, they are nothing to the purpofe; for as to the *first*, which is *Frafer's*, there was not one Circumftance pled or proved which could make the Slaughter *chaud melle*: But on the contrary, it appeared direct premeditate Murder, no real Provocation but a Quarrel

Quarrel about a Staff; a Murder committed in Revenge, upon the Slayer's hearing the Person killed had murdered his Brother, which plainly implied a premeditate Design: What Argument this can afford, is submitted: This indeed may be remarked, That the Case gives some Notion of the Spirit of the Times, the Presbytery took Evidence whether the Murder was accidental or wilful, they found it to be wilful, and nowise accidental; *Their* having done so, was taken as Evidence in Court, and even the Wife of the deceased was sworn as a Witness: Things 'tis hoped not to be drawn into Example; only so far it shews, that even then it was a Consideration by the Presbytery themselves, whether it was a wilful Murder or not, which seems to point at an Establishment of the Distinction: But in short, there is not one Circumstance in the whole Case that could exclude the Premeditation or Forethought, but all quite on the contrary.

THE other Case of *Marshal*, in the 1644, is as little to the purpose, he was libelled for wilful Murder, and he confessed it without pleading any Defence, because indeed he had none; he in his Confession adjected some Circumstances which might have given some colour, but indeed very little for a Defence: But he offered no Proof even of those Circumstances, and his own Declaration could be no Evidence of them; they were not intrinsic, but extrinsic Qualities of the Declaration; he had given repeated Stabs with a Knife. Where could be the Question that that was Murder? And these being all the Instances the Pursuers bring before the Act of *Charles II.* 'tis plain they prove nothing by them.

As to the Act, *Charles II.* * It is humbly insisted for the Panel, That it introduces no new Law against any Person accused of Slaughter, but ascertains somewhat in their favours, viz. *That casual Homicide, Homicide in lawful Defence, and Homicide committed upon Thieves, &c. shall not be punished by Death;* and then further statutes, *That even in case of Homicides casual, it shall be leifom to the Criminal Judge, with Advice of the Council,*

* This entire Act is hereto subjoined.

Council, to fine him in his Means, &c. or to imprison him. This Law seems introduced to correct some Abuses that had been; whereby Homicides falling under some of those Descriptions, either had been punished with Death, or at least that it had been made a doubt of, if they might not be so punished: What those Cases were, does indeed not appear from the Records, so far as the Pannel's Procurators know; but it seems such Cases, at least such Doubts were. But then the Act does not determine what was meant by *casual Homicide*, and does by no means say, That nothing was to be reckoned casual Homicide, except that which was merely *accidental*; but on the contrary, it leaves casual Homicide to be explained, according to the Construction of former Laws; whether our own Laws, or the Laws of other Nations.

2do, It is plain from the Act, that by casual Homicide, something is understood quite different, at least beyond Slaughter merely *accidental*; for the Act is concerning the several *Degrees* of casual Homicide: And so even Homicide in Defence, and Homicide committed upon Thieves, &c. are brought under that general Description of casual Homicide; and these last Kinds are given as Exemplifications of the general Description; which shows, that casual Homicide was intended to be opposed only to Slaughter *dolose*, committed either by premeditate Forethought, or Malice presumed to be taken up from the Circumstances immediately preceeding the Act; and therefore, however critical Exceptions may be taken to the ~~Act~~, yet materially there is no strong Objection lyes to it; because when *casual* is taken in the extensive Signification, as opposite to *fraudulent and dolose Slaughter*, all the Species mentioned in the Act do properly enough fall under it, and are *Degrees of casual Homicide*: And indeed it is worth observing, and makes in this Case for the Pannel, that the Rubrick cannot be said to have been indigested or adjected by mere Inadvertency, since the same Rubrick is made use of in the Act 1649; and again repeated in the 1661, so many Years after.

AND this Rubrick affords another plain Argument, That

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the Legislative did at least consider that there might be *Degrees of casual Homicide*, and consequently they could not understand by that, only *merely accidental Slaughter*, strictly so called: Since there can be no *Degrees of that*, it is but *one*, and does not admit of *Degrees*; and therefore this is sufficient to show, that *more* was meant than the Pursuers incline to admit; and if *more* was meant, *that* can allow of no other Construction, than to bring under these Words what the Lawyers call *culpable Homicide*; so as that your Lordships and the Jury may judge from Circumstances, whether the Slaughter is to be reckoned as *casual*, or *really malicious* from Malice prepenſe.

THE last Part of that Act of Parliament further enforces that Matter; which gives a Power, not only to fine for the Use of the nearest Relations, but even to imprison for casual Homicide: Now, how is it possible to believe, in consistency with any Justice, that a Man might be imprisoned for a Fact entirely innocent, and no ways either culpable or criminal? yet such Homicide merely accidental is: And therefore this shows to Demonstration, that the Legislative understood, that under the Description of *casual Homicide* such a Fact might come, as carried a *culpa* along with it, and was not *absolutely accidental*, or *innocent*.

AND this being the plain Meaning of the Law, it must remain only to consider; whether *culpable Homicide*, or more particularly, the present Case does not in a true and legal Sense fall under the Words *casual Homicide*: And we hope we can be under no Difficulty to make that good, from what has been already said: *First*, That even by the *Jewish* Doctors and Interpreters of the *Mosaick Law*, *Homicide without Hatred and Foresight*, hath been called *casual Homicide*; the Passage above cited from the Collation of the *Mosaick and Roman Law*, expressly shows it. *2do*, All that has been said from the Texts of the Civil Law and Lawyers prove it; since they directly call Slaughter, *ex subito impetu*, *ex calore iracundiae*, *in rixa*, where there was just Provocation, *casual*; *casu magis quam voluntate fit*;

fit; casui magis quam noxae imputandum : And all the rest of their Expressions plainly denominating all Slaughters *casual* in the large Sense, except that which is done *doloso animo occidendi*. 3^{tio}, The Expressions in our own old Laws prove the same Thing; those Kind of Slaughters are called *chaud melle*, or *Chance-medley*, which is *casual*: And so Skeen speaks, in the very Place the Pursuers have cited: “ *Manlaughter committed* “ voluntarily, be forethought Felony, or (or not which ever of “ the Degrees be received) casually by *chaud melle*: There your Lordships see *chaud melle* is expressly brought under the Description of *casual*; and so that being the Case, we are under the Letter of the Act, Charles II. we are included under the first Branch of *casual Homicide*.

AND as we apprehend this holds in general, so it holds more particularly in the Pannel's Case, where whatever was designed against *Bridgeton*, yet as to my Lord *Strathmore*, the Killing was *casual*, and therefore falls directly under the Words of the Statute.

IT affords no solid Argument against us, That the Act of Parliament bears these Words, **for removing of all Question and Doubt that may arise hereafter in criminal Pursuits for Slaughter**. For 1^{mo}, Those Words must still be understood with Regard to the Particulars enacted upon, that it is for removing *all Doubts* as to those Particulars, for it can never be pretended, that this or any Act of Parliament could remove all Doubts, even upon untold Cases, many of which might happen that could not fall under the Words of that Law; for instance, Homicide committed in suppressing a Mob, strictly speaking, falls under none of the Words, or Homicide committed in preventing the escape of a Prisoner actually imprisoned, and endeavouring his Escape, and many other Cases may be figured. But 2^{do}, According to the Interpretation we insist upon, the Act of Parliament does remove all Questions, so far as humane Eyes could foresee, if the Words, *casual Homicide* be taken in the Sense we give them; and on

the contrary, it does not remove all Questions, if culpable Homicides, and this very Case be not included; for then the Law has statuted nothing upon them, either one Way or other, but hath only statuted upon Murder meerly accidental, Homicide in Defence, and the others therein mentioned; besides, that it may be pled without any Stretch, that a culpable Homicide is a Species of *Homicide in Defence*, tho' not precisely in Defence of *Life*, it is in Defence against a *further Injury* threatned, and expected from the *prior Injury* already given, and on these Considerations we humbly apprehend the Act of Parliament makes nothing against the Pannel, but rather favours him, since the Question is anent a Homicide *purely casual* as to the *Person* that was killed; and which Consideration intirely distinguishes his Case from every other Case that hath been tried since the Act of Parliament; and it may not be improper to notice, that Sir George Mackenzie says, *The Word, Casual, in the Rubrick of this Act, is taken in the lax Signification*; and why not then take it in the same lax Signification in the statutory Part?

It is now proper to take Notice of Sir George Mackenzie's Observations upon the 51. Act James I. And in the first Place, if Sir George, be supposed to go as far in his Opinion as the Pursuers plead, we must beg Leave to oppone the Law, and submit the Interpretation of it to your Lordships Judgment, as not sufficiently supporting his Opinion. 2^{do}, Sir George says nothing against the Slaughter's being casual in the present Case, where the Blow was intended at one, and another struck by Fatality. 3^{tio}, His Words do not go so far as the Pursuers would stretch them; for in his Observation on the said 51. Act, he only says in general, *That-Chaud melle, or Homicidium in rixa commissum is capital by our present Law*; and so it is in many Cases; for instance, where the Killer is the Provoker, where he reiterates Strokes in such a Manner as to show a Forethought and formed Design, altho' not premeditated for a long Interval of Time before; but Sir George does by no Means say that *Chaud melle* or *homicidium in rixa commissum*

missum, is in every Case capital ; the contrary is most certain, as will appear from your Lordships Judgments afterwards to be noticed.

HIS Observation upon the 90th Act is no ways against us ; he says indeed, *That Murder tho' committed without Forethought Felony, is punishable with Death* : By which he must mean premeditate Malice ; and that is true ; for no doubt Malice, where it can be presumed from the Act it self, and where the contrary does not appear from Circumstances, is punishable by Death, without further Forethought ; but then he subjoins an Exception, which leaves the Matter where it was, *Except*, says he, *it be casual*, that is, according to the Words of the Law ; and so the Question remains, what is casual in the Sense of that Law ?

THE Pursuers use an Argument, which seems to be of no Force, *That if Manslaughter was not capital, then the Crown could not pardon any capital Slaughter, because by our Law the Crown could not pardon Murder*. We might easily admit the whole, without hurting our Argument ; for if it be true that the Crown could not pardon Murder, then it is likewise true, that he could not pardon any Slaughter that was capital, because no Slaughter was capital but Murder, nevertheless the Position that the Crown could not pardon Murder, is not supported by Practice, and we doubt, not by our Law, because in several Cases even of Murder, the very Thing statuted, is, *That the Person of the Criminal shall be in the King's Will*, consequently the King can pardon as well as order to be put to Death.

THE Pursuers in their Information next go on to mention a great many Cases that have been judged by the Court since the Act 1661 ; and the first mentioned is that of *William Douglas*, which appears in the Records, and is noticed by Sir *George Mackenzie*, and is indeed noticed by him as a Foundation for some Things, wherein he seems to go too far : But this Case will never deserve any Regard ; it has always been
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looked upon as a hard one, and we are afraid a Reproach on the Justice of the Nation. But at the same Time the Fault did not ly on the Court, it was truly the Jury, for the Trial went in general upon the Art and Part, and there appears no particular Pleadings to this purpose on Record in that Case ; so that what Sir George says of it must be from mere Memory of Things not thought fit to be recorded.

THE next Case mentioned is that of *Nicolson* in the 1673, which can never make for the Pursuers, because there your Lordships sustained both the Libel and the Defence, tho' indeed the Defence was not proved ; and therefore if the Pursuers say, that the Defence was upon *chaud melle*, or *culpable Homicide*, the Case is with us, because your Lordships sustained the Defence : And altho' in reality the Crime was proved to be wilful Murder, and the Defence not proved, yet so far it is on the Pannel's Side, that the Advocate insisted *Nicolson* was *versans in re illicita*, by carrying a Gun which he acknowledged used to go off on half-bend ; yet your Lordships sustained the Defence, *That the Gun went off in a Struggle* : And if an Argument from a Lawyer's Pleading be good for any thing, Sir George Mackenzie pled for the Pannel in that Case some of the very same Principles we now insist on, *That there was no Prejudice against the Person killed, and that the Gun went off in a Struggle*. But indeed the Case is nought in the Argument, and it seems strange why it is cited : It is true the Man was said to be drunk, and there was not a previous Quarrel ; but then there was no Provocation, no *iusta causa iracundiae*, and no *iracundia* at all, but the Gun was twice deliberately snap'd, and the third Time the Man was killed.

THE 3d Case mentioned, is *Murray contra Gray*, yet less to the Purpose than any other : For there, the giving the Wound was libelled so far premeditate, that the Slayer followed the Person out of the House where he was, and killed him without any Provocation. And not one single Fact was pled in Defence, but a strange Demand made, That the Lords should
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make an Inquisition, in order to discover who was the first Aggressor: But it was not once pled that the Defunct was the Aggressor or Provoker. What can be the Meaning of citing such Cases?

THE next Case cited is that of *Airds*, in the 1693; which indeed is something more to the Purpose, but yet does not answer the Pursuers Intention: For the Lords did not there find, That every Homicide was capital except what was merely accidental; they indeed sustained the Libel, and repelled the Defences, which were mainly founded upon Provocation by ill Words from a Woman, and her throwing a Chamberpot at the Pannel's Face, who was a Soldier: Which the Lords did not find sufficient to exculpate from the Libel, which bore reiterate Strokes to have been given the Woman in her own Door, (which by the by was Hamesucken) she thrown over the Stairs, and pursued by the then Pannel. That Case was very singular: First, an Attack upon a Woman by a Soldier, who ought to have contemned Insults from the Female Sex, at least, not returned them with any Blows: No Injury of that Kind from a Woman, can justify Blows given, much less reiterated Blows, and deliberately Trampling to Death, throwing her over her Stair, and still continuing to pursue her: There, the presum'd Difference of Strength, and Difference of the Sex, made such an Attack a barbarous Murder; just as an Invasion by a much stronger Man against a weaker, or by a Man against a Woman, altho' not with a mortal Weapon, would make a Blow with a mortal Weapon, given by such a Woman or weaker Person, come within the Description of Self-defence: Which is a Case that Lawyers state, altho' the same Thing would not be good, if they were of equal Strength, or that the Invasion was by the Woman or Person of weaker Strength.

ANOTHER Case mentioned, is that of *Carmichael* in the 1694. But sure your Lordships must be weary of so many Cases, so little to the Purpose: For neither there, is there one

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Circumstance pled upon to exclude Forethought, or to show that the Thing was casual in any Sense; but some trifling Objections against the Form of the Libel: Only indeed, *Drunkennes*, by itself, was founded on, which your Lordships did not sustain. And who can doubt it must be so?

THE 7th Case mentioned by the Pursuers, is that of *George Cumming* in the 1695. And upon looking into the Case, it must be owned, that it seems a very narrow hard Case: But then, the whole Burden of the Pursuers Pleading turns upon this, That supposing there was a *Rixa*, and that the Thing happened upon a sudden Quarrel; yet *Cumming* himself was the first Provoker, and the *auctor rixæ*, and therefore could not plead the Benefit even of Self-defence; which indeed brings the Case within what all Lawyers agree on. And had it not been for that Circumstance, 'tis impossible the Decision could have gone as it went: For in effect, the King's Advocate admitted the Defence, barring that Circumstance; but insisted upon that as what governed the Case. Yet still the Decision is narrow,

THE Pursuers also mention the Case of *Burnet of Carlops*, Anno 1711. But it is plainly against them; and it being to be noticed for the Pannel, shall not be dwelt upon here.

THE next Case is that of *Hamilton of Green*, Anno 1716; which does not at all meet: For there a plain Murder was libelled, That the Pannel first made several Pushes with his Sword and Scabbard upon it, and not content with that, drew the Sword, and gave the Defunct the mortal Wound. And no Provocation was pled upon, on the part of the Pannel, except what was verbal only. And the only real Injury, by striking with the Sword and Scabbard, was admitted to have been given by the Pannel. And tho' it was there pled, That the Defunct himself rushed upon the Sword, that was contrary to the Libel: And if the Fact had come so out, the Libel would not have been proved. And therefore, that Case does not at all meet; for there were not sufficient Circumstances

ances to exclude the Dole, or so much as to make a *homicidium culposum*.

ANOTHER Case they mention, is that of *Thomas Ross* and *Jeffrey Roberts*, 20 July 1716; which makes against the Pursuers, as it is set forth by themselves: For there the Lords did sustain the Defence of Provocation by Words, Receiving a Blow on the Face, being pull'd down to the Ground, and beat with a great Stick or Car-rung, *relevant* to restrict the Libel to an arbitrary Punishment. And tho' the Words, *To the imminent Danger of his Life*, are inserted as they were pled in the Defence; yet that was not a *Fact*, but a *Consequence* inferr'd from the being struck with a Stick. And if the *periculum vitæ* had been the Foundation on which the Interlocutor went, then it must have been unjust; because no Man alive ever doubted that a Man, in Self-defence, might lawfully kill, without being subject to an arbitrary Punishment, or any Punishment whatsoever: But the Case was, That your Lordships found the Provocation and real Injuries reduc'd the *Fact* to a *homicidium culposum*. You indeed sustained the Reply, That the Defunct was held by *Jaffreys* at the Time of receiving the Wound, because that excluded the Defence of the Pannel's being upon the Ground when he gave the Wound, and made the *Fact* amount to Murder; because it never was doubted, but if one stab another, especially with a Knife, which is stabbing in the most barbarous Sense, when that other is held, and so put out of the State of doing further Injury, that is Murder by the Law of all Nations.

THE Pursuers likewise mention a Case of *Davidson*, without noticing either Date or Circumstances; and therefore the Pannel must conclude there was no Defence proponed, exclusive of the Dole or Forethought.

THE Case of *Lindsay* and *Brock*, the *Greenock* Taylors, is very far from putting the Case out of Doubt, or indeed touching it at all. The Case was, That the Defunct was enticed out of his House, and was attack'd by Two at the same Time;

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and when he and they were on the Ground, one of them which came out to be *Lindsay*, stabbed him in the Throat with a Pen-knife. There your Lordships did not sustain the Crime, as Capital, against them both, even upon the Art and Part, but only against the one who should appear to have given the Stab, and that came out to be *Lindsay*: But then indeed you found, not without Difference in Opinions, That nevertheless he had the Benefit of the Indemnity, upon this Foundation, That tho' the *Homicidium* was *dolosum* because of the Circumstances, yet it was not from Malice premeditate: And the Majority were of Opinion, that the Indemnity excluded nothing but premeditate Murder, and did not touch any Case done *in rixa*, notwithstanding the Person guilty might be the Author *rixæ*. This does by no Means determine any Question betwixt a *dolosum* and *culposum homicidium*, for that Fact was insisted to be *dolosum*, and indeed so found. 'Tis true it proves that an Indemnity may reach even a *homicidium dolosum*, where the *Dole* arose immediately, and not *ex intervallo*; but that says nothing to this Question, nor is it proper to enter upon the Argument about the Indemnity, now that the Judgment is given.

The Case of *Matthews* the Soldier, the Pursuers admit was of the same Nature, and so needs no other Answer; only, That, in that Case, there were no Circumstances sufficient to exclude the *Dole*, or make it only a culpable Homicide.

These are all the Cases the Pursuers have mentioned, and, if Numbers would do, no Doubt there is enough, but your Lordships are to judge how far to the Purpose: And one Thing is remarkable with Regard to them all, That not one of them touches the Case in Hand, in so far as concerns the Slaughter's being casual as to my Lord *Strathmore*, the Invasion being intended against *Bridgeton*.

BUT now the Council for the Pannel beg Leave to take Notice of several Decisions, even since 1661, which directly establish

establiſh the Point pled for the Pannel: And the firſt is *Mason's* Caſe in the 1674, to be ſeen in the Record; and alſo obſerv'd by Sir *George Mackenzie*. *Mason* was accused of killing *Ralston*. The Defences were three, Firſt, that *Ralston* had followed *Mason* from Houſe to Houſe, at laſt put violent Hands upon him, whereby *Mason* was forc'd to throw him off, and that he fell againſt a Stool. 2^{do}, That the Wound was not mortal, but *Ralston* died *ex malo regimine*. 3^{tio}, That the Homicide was merely caſual, and in Self-Defence, *Ralston* being the Agreſſor. The Lords ſuſtain'd the Libel only Relevant to infer the *pœnam extraordinariam*, and ſeparately ſuſtained the other Defences to aſſoillie in *totum*, and remitted all to the Knowledge of the Inqueſt. Here your Lordſhips ſee, the Killing only ſuſtain'd *ad pœnam extraordinariam*, without Regard to the three Defences of *Caſual Homicide*, *Self-defence* and dying *ex malo regimine*; for they are all ſuſtain'd ſeparately to aſſoillie, even from the *pœna extraordinaria*: Here then was a culpable Homicide, ſuſtained only *ad pœnam extraordinariam*, tho' neither merely caſual, nor in Self-Defence, and ſo there can be no Judgment more direct upon the Point now pled.

AND here the Pannel muſt notice, once for all, That it makes nothing to this Queſtion, That in that and other like Caſes to be mentioned, a mortal Weapon was not uſed; for it is one Queſtion, What is ſufficient to make a Homicide only culpable? And quite an other, Whether, in our Law, there is ſuch a Thing as culpable Homicide, tho' neither merely caſual, nor in Self-Defence? That of the uſing a deadly Weapon enters into the Argument, Whether a Homicide is *doloſe* or *culpable* only? But it makes nothing to the other Queſtion, ſince Homicide may not be merely caſual, altho' no mortal Weapon is uſed, as appears both from this Deciſion, and the Caſe of *Bain* cited for the Purſuers.

Another Caſe is that of *Grierson* and others, 12th *March* 1684. where the Pannels being accused of Murder, for

killing the Defunct in a Scuffle, the Defence proponed was, That the Defunct was the first Aggressor, and did invade the Pannels, or one or other of them, and that *William Grierson*, or one or other of them, being standing before the Fire, the Defunct threw the said *William*, or one or other of them in the Fire, and fell upon him himself; and then, after the Scuffle was over, the Defunct did rise walked up and down, discoursed, and of new again, beat the said *William Grierson*, and threatned to kill him, if he would not be gone; that the Defunct went in good Health to the Door thereafter. These the Lords sustained relevant to liberate from the ordinary Pain of Death. Here is another Decision in Point, the Crime was not found merely casual, or the Court must have assoilzied; at least, could only have imprisoned, and could have inflicted no other arbitrary Punishment. But that was not the Case, it was found *culpable*, and not *merely casual*; and therefore the *Punishment restricted*. Sure then, it is not true in Law, that *all Homicides* are *capital*, unless they be *merely casual*.

A 3d Case is that of *Maxwel* and others, 7th November 1690. pursued for the Murder of *John Russel*, where the Court sustained this Defence, That there was a previous Combination, to make a Convocation in Order to debar and keep out Mr. *Walter McGill* Minister of from entering into his Church that *Sunday*, in Consequence of which, a Convocation happened; and when they were required to disperse, they took the Keys from the Beadle, and beat the Notar and the Minister's Wite, and others, before the Slaughter was committed, relevant to *restrict* the *Slaughter* to an *arbitrary Pain*. And found yet further, That if any actual Attempt was made, by throwing great Stones at the Minister, before committing the Slaughter, that that was sufficient to liberate from the Slaughter *simpliciter*. Sure the first Part of the Defence, implied neither

ther accidental Homicide, nor Self-Defence ; but a *Provocation* by *real Injuries* ; yet the Court justly sustain'd it to restrict.

On the 6th *November*, that same Year, another Judgment was given, very opposite to the Pursuers Pleadings, in the Case of Captain *Price*, and others, who were prosecuted for shooting one *John Reid* a Tradesman of *Glasgow*, and Serjeant at that Time, of a Guard kept in that Town. The Case was, That Captain *Price*, and others with him, had made some Disturbance in the House where they lodged, and committed some Rudeness to the Landlady and her Maid, which occasioned the Guard to be called, and when the Guard came, commanded by *Reid*, and entred the Room where *Price* was, he and his Company resisted the Guard, and one of them shot *Reid* dead. The Defence proponed, was, That before any Guard came, a Mob had begun to rise, and had gathered at the Door where the Officers were, who had shut the Door upon themselves, and cried to shoot the Dogs, and Words to that Purpose ; that when the Guard came, they did not know it was the Guard, but resisted and fired, from Apprehension that it was the Mob, and so killed *Reid* the Commander of the Guard. The Lords sustained that Defence relevant to restrict the Libel. And in that Judgment, beside the Establishment of the general Principle, this may be observed, That *Reid* was killed by *Mistake*, as one of the Mob, and there neither was, nor could be any Provocation from him ; neither was it pled, That the Mob had given any real Injury, but only were gathered in a tumultuous Way, and uttering injurious Words ; yet the Court justly restricted the Libel, tho' tis plain, the Slaughter was not accidental, except in so far as the Commander of the Guard was killed in Place of a Mobber Neither was it Self-defence, because the Pannels had no Right to resist the Guard, only there was an Injury by the Con-

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vocation, and an Apprehension given of greater Injuries, tho' that Apprehension was not solidly founded.

THE Case of Captain *Wallace* firing on the Boys from the *Abbey*, may likewise be noticed; but, being a well known Case, needs not be at Length recited.

A 4th Case is that of Ensign *Hardie*, 6th June, 1701. He was accused of Murder, by giving repeated Thrusts with a drawn Sword, to one *Smith*, who, at the Time had no Arms, whereof *Smith* instantly died, and that he afterwards boasted of his Crime and Cruelty, telling other Gentlemen, That he had bowed his Sword upon the Person of a Fellow at *Scarbridge*. The Defence proponed, and sustained, was, That the Defunct was the first Aggressor, and did take hold of the Pannel's Horse-bridle, and when he was holding the Horse by the Bridle, did give the Pannel a Stroak over the Face, with a Rung or Tree, and wounded him, to the Effusion of his Blood, and that the Defunct beat the Pannel from his Horse. These were found relevant to restrict the Libel to an arbitrary Punishment. And then the Reply was sustained relevant to elide it, That the Pannel beat the Defunct on the Face with a twisted Rod, before he struck the Pannel. Here again, the Point is fixed: No casual Homicide, not Homicide in Self-defence; and so your Lordships had found by a former Interlocutor, wherein you repelled the Defence, when proponed as Self-Defence, but yet restricted the Punishment, because the Homicide was culpable.

A 5th Case yet stronger is, That of the 1st March 1710, *Peter McLean* who was accused of the Murder of *James Ewing*, by shooting him dead with a Fowling-piece, when *Ewing* had no Arms in his Hand. The Defence sustain'd to restrict the Libel to an Arbitrary Punishment was, That the Defunct quarrelled the Pannel, under the Name of Rascal, how he durst carry a Fowling-piece, and that if the Prince had his own he durst not so do; and adding these Words,
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That her Majesty was but a Whore, and thereupon assaulted the Pannel for taking his Carabin from him. These are the Words of the Interlocutor; and it is so plain, that no Observation needs be made upon it.

An other Case is, that of *Bathgate*, 23^d January 1710. He was accused of murdering *Andrew Braidwood*, by throwing him down to the Ground, and giving him several Strokes and Bruises, whereof he died. Your Lordships found the Libel only relevant to infer an Arbitrary Punishment; yet the Fact was not entirely casual, nor pled to be so; and you sustain'd the Defence, that the throwing down libelled, was only a Wrestling, out of no Malice, and that previous thereto, the Defunct was Valetudinary, and in the Habit of spitting Blood, relevant to elide the Libel in *totum*.

The Case of *Govan*, 3^d March 1710, is not so plain as the others abovementioned; but yet it does assist in the Question; for there your Lordships sustain'd opprobrious Language and Invasion, by beating in a Scuffle, tho' without mortal Weapons, relevant to restrict the Punishment of killing with a Sword, even suppose the killing should be proved to have been without the Door of the House, when the last beating was only pretended to have been within the House; and so the Beating must have been over before giving the Wound, and the Pannel employ'd in *prosequendo*, by Way of Retortion of the Injury that had been given.

An other unanswerable Case is that of *Carlops*, January 8th 1711. The Circumstances of which are so well known, that 'tis in vain to repeat them; sure it was neither accidental Homicide, nor Homicide in Defence; but the Lords sustain'd the Defence, that the Beating was *per plures commissum*, in Conjunction with any two of the following Defences, to wit, that any Beating committed by them was in a Tulzie or *rixa* in which they mixed themselves, to relieve a Youth in the Defunct's Grips, or in a Struggle with him; or *separatim*, That they had Swords about them, and only made Use

Use of Staves or Batons, relevant to restrict the Libel to an Arbitray Punishment.

THERE is another Case likewise worth noticing, 18th December 1712, The Case of Sergeant *Davies*, who was accused of the Murder of Mr. *Robert Park* — where your Lordships found the Pannel his being alone, Time and Place libelled, and a Scuffle then happening betwixt the Defunct, with two or three more in his Company, and the Pannel, and after a Beating with Staves betwixt the said Men and the Pannel, the said Pannel his retiring and calling for the Guard; and being mutilate in the Hand before he gave the said mortal Wound, relevant to restrict the Libel to an Arbitrary Punishment.

AN other very late Case is that of *Gaspar Rysarno*, 14 December 1724, Where the Pannel being accused of killing *Robert Lamb*, by throwing him over the Stairs, without Cause or Provocation, whereby he was brain'd; your Lordships sustain'd it only relevant to infer an Arbitrary Punishment; yet sure it was not accidental, far less in Defence. All which Cases, plainly establish the Point, that even since the Act of Parliament 1661, the constant Practice hath been to find *culpable Homicides* only relevant to infer *Arbitrary Punishments*; and that there are *Homicides not punishable with Death, tho' neither merely accidental, nor in Self-Defence*.

THERE is also a Case which deserves to be noticed, As to that Point, of a Third Party's being killed when interposing betwixt other two in a Scuffle, which is the Case of *John Graham*, 1st December 1712, where *Graham* was accused of murdering *David Cochran*; But your Lordships sustained the Defence, That while he was attacked by *Blyth* with a drawn Durk, the Pannel was in his own Defence with a drawn Bayonet; and that in the mean Time, the Defunct interposing as a Redder betwixt them, did *casually* receive the Wound libelled, relevant to restrict the Libel to an *Arbitrary punishment*.

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THIS Information having drawn to so great a Length, we are unwilling to trouble your Lordships with further References to the Laws of other Countries, particularly to the Law of *England*, altho' we apprehend the Law there does not differ substantially from our Law in this particular, except it be in these. 1st, That Man-slaughter is in Effect, not punishable at all in *England*, otherways than by a kind of Elusory Punishment. 2^{do}, That in no Case *Dolus* is presumed, only from the giving the Wound, except upon the particular Statute of Stabing; whereas indeed it is in several Cases otherways with us; culpable Homicide is punishable arbitrarily, and no Doubt in many Cases, where contrary Circumstances do not appear, the giving the Wound presumes Dole, and even by the Statute of Stabing, the Killer hath the Benefit of his Clergy, if the Person killed give the first Blow or real Provocation; and that, altho' the Provocation did not immediatly precede the Act of Killing, if it happened at any Time of the Quarrel.

THAT by the ancient Law of *England*, slaying a Man did not infer Death, yea perhaps not what we call Murder it self, seems plain from *Assisa Henrici Regis apud Northampton*, published by *Selden*, in his *Fanus Anglorum*, Page 120 of the last Edition, by which it appears, That even Murder it self and Robbery, was punishable only by Mutilation, such as cutting off the Hand or Foot; and all their Law Books, as well as the daily Practice, establishes the Distinction betwixt Fore-thought Felony and slaying on Suddenty; yea of old, even a Murderer, by Malice *prepense*, seems to have had the Benefit of the Clergy, and that Benefit only taken away from such Murderers, by the 1st Act, 23 H. 8. and their Books of Reports are full of the Examples that Slaughter on suddenty is not Murder or Capital. In *Cook's Reports* it is stated, That several Men playing at Bowls, two of them quarrelled, and a Third, in Revenge of his Friend, struck the other with a Bowl, of which Wound he died: This was held Man-slaughter, for it was done upon a sudden Emotion, in Revenge of his Friend.

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There likewise two Boys combating together, one of them was scratched in the Face, and his Nose run a great Quantity of Blood; he went three Quarters of a Mile off to his Father, who seeing him all bloody, took in his Hand a Cudgel, and went three Quarters of a Mile to the Place where the other Boy was, and struck him upon the Head, of which the Boy died. This was held but Man-slaughter, for the Ire and Passion of the Father was continued, and there was no Time determined in the Law that it was so settled, that it shall be adjudged Malice *prepenſe* in Law.

The Case of *Mawbridge* ſet down at length by Lord Chief Juſtice *Keyling*, makes ſtrongly for us; and we beg Leave to refer to the whole Treatiſe there ſet down, and particularly to the firſt Ground of Provocation, which he declares to be ſufficient ſo as to alleviate the Act of Killing, and to reduce it to a bare Homicide: He ſays, *If one Man, upon angry Words, ſhall make an Assault upon another, either by pulling him by the Noſe, or ſtillipping upon the Fore-head, and he that is ſo aſſaulted ſhall draw his Sword, and immediately run the other thorow, that is but Man-ſlaughter, for the Peace is broken by the Perſon killed, and with an Indignity to him that received the Aſſault; beſides, he that was ſo affronted might reaſonably apprehend that he that treated him in that Manner might have ſome further Deſign upon him.* Your Lordſhips ſee how cloſe this is to the Caſe; the Inſult and Indignity done by *Bridgeton* was vaſtly ſtronger than any Thing here mentioned; and having received ſuch an Affront, he had Reaſon to expect worſe, more eſpecially, when as we offer to prove, *Bridgeton* was endeavouring to pull out my Lord *Strathmore's* Sword.

We muſt likewise humbly refer to ſeveral Caſes ſet down by Sergeant *Hawkins*, in his Pleas of the Crown, which fully agree with what we now plead, and particularly take
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Notice of what he says, Page 84. *If a third Person accidentally happen to be kill'd by one engaged in a Combat with another, upon a sudden Quarrel, it seems that he who kills him is guilty of Manlaughter only.* And it would seem that there is even a Difference made, betwixt Killing a Person that endeavours to interpose, if he tell that he comes for that Purpose, and killing one who accidentally is interposed betwixt the two contending Parties, which was my Lord *Strathmore's* Case. The killing him who interposes to separate, if he give Notice what he is doing, is reckoned worse than the killing the other; and this Observation shews that the present Case is stronger than the above-cited Case of *Graham*, where your Lordships restricted it to an arbitrary Punishment. And what that Author observes, confirms a Distinction we have made, betwixt a Man quarrelling with another, and killing a third Party, where it is proved the Killer had a felonious Intention to murder the other; and the Case where that does not appear: for however, in the first Case, he might be guilty of the Murder of the third Party, yet if a Design to murder the Person he quarrelled with is not proved, then he can never suffer capitally for killing the third Party: And we have already endeavoured to prove, that that must be the Case as to *Bridgeton*, where he gave the Provocation, and no Act followed against him, sufficient, in Law, to establish a Design of murdering him.

The Pursuers have cited the same Books, and *Mawbridge's* Case, as for them; but that we submit. The particular Cases of *Holloway* and *Williams* the *Welsh-man*, spoke of by *Keiling*, are not at all to the Purpose; the *Welsh-man's* Case was no Judgment; but neither in that nor in *Holloway's* was there any *real personal Injury*, on which a great Stress is laid in all these Questions.

The Pursuers mention an other Case stated, but never adjudged, A Person shooting at Fowls with Intent to steal

them, accidentally kills a Man, that will be Murder. This perhaps may be justly doubted; sure it would be too severe; but supposing it were so, 'tis of no Importance. Stealing, even of Fowls, by the Law of *England*, is Felony of Malice *prepenſe*, and where a Man attempting to commit one Felony, does another, there is little Doubt but in strict Law he is guilty of the Felony committed; but what is that to the Case of a Provocation by a real Injury?

The Pursuers have quoted the Authority of *Voet*, and a Decision observed by him from *Sande*, to prove, That where one Man was intended to be killed, and another slain, the Crime is capital, in which, no Doubt, *Voet* differs from many as learned Lawyers, who are of the other Side: But his Opinion and that of *Sande's*, is obviated by what is already said; it is only in the Case of no Provocation, or real Injury on the Part of him who was designed to be killed. And, *2do*. 'Tis always taken for granted by *Voet*, and all who are of that Opinion, That the Design of murdering the Person intended to be invaded, do appear, and is proved; but we have already shown, that cannot be said in the present Case.

The pursuers pretended, That there was a Circumstance in the Libel, which implied Malice against the Earl of *Strathmore*, viz. That the Thrust given, was followed by a second Push: But as there is nothing in this Fact, it may be the Subject of Imagination, but can never be the Subject of Proof, unless it were pretended, as it is not, That the Pannel drew back or out his Sword, and made a second Thrust, which will appear not to be true, from the Nature of the Wound, and the Thrust will be found to have been so momentary, that it was impossible. *2do*. If any Thing like that happened, it will appear, that there was no more in it, but the Pannel's staggering or moving the Sword, by his Weight leaning upon it. *3tio*. There is no Relevancy in it at all, the
Fact

Fact being, That the Pannel pushed as at *Bridgeton*, and no Circumstance will make it appear, that he knew he had touched the Earl of *Strathmore*, till sometime after the Fatality was perfected.

The Pursuers further pretended, That as they had libelled Malice, they would prove it from other *antecedent* Facts, that had happened some Time before, whereby it would appear, that there was Enmity betwixt the Defunct and the Pannel.

It is answered for the Pannel, *imo*. That no such Facts being libelled, nor, to this Minute, condescended upon, either in the Debate or Information, they can, by no Means, enter into the Proof, otherways the highest Injustice would be done to the Pannel, in this and every such Case; for, if the pretended Facts, inferring Malice, had been libelled, then it would have been competent to the Pannel, to have elided the same, by a proper Proof, to show that they inferred no Malice on his Part; he might have proved Diffimulation or Reconciliation, and would have been prepared for that Purpose. But where such Facts are concealed, and may have happened at an unknown Distance of Time, 'tis impossible the Pannel can be prepared with proper Evidences. And tho' it is sufficient in an Indictment, to libel Malice in General, in Order to make a Relevancy; yet then, it is always understood, that the Pursuer intends no more, than the presum'd Malice arising from the Fact libelled; neither can such Proof come in, under the Head of Art and Part, because that can only have Regard to such Facts as happen at the Time of committing the Action complained of, and such as import a Share in the Action; but cannot reach to pretended Qualifications of Malice, that happened, the Lord knows when.

In the next Place, the Pannel offers to exclude all Pre-
tence of former Enmity, by proving, That for some Time
before, they had met from Time to Time, occasionally,
with

without any Marks of Enmity, but all the seeming Requisites of Friendship and Civility interveening ; and particularly, that that very Day, they had dined together, afterwards drunk together for a considerable Time, and visited together, in the Lady *Auchterhouse's*, a common Relation, with all Appearances of Friendship ; and that the deceased Earl had kindly invited the Pannel and his Family, to come and visit him and his ; and made a Challenge of Kindness of it, that he was too great a Stranger. In the Case of Enmity, the divine Law it self determines, when Hatred is to be presumed, and when not. *Whoſo killeth his Neighbour ignorantly, whom he hated not in Time paſt.* In the Hebrew, from Yesterday, the third Day ; or, as in the Latin Translation, *qui heri & nudius tertius nullum odium contra eum habuiſſe comprobatur* ; ſo that the very Friendship that paſſed that Day on which the unhappy Accident happened, excludes all Pretence of former Enmity, ſuppoſe there had been any ſeeming Differences, of which the Pannel is not conſcious, far leſs of Malice, or any capital Enmity that ever was.

Upon the Whole, tho' this fatal and melancholy Accident, which gives Occaſion to the Trial, does and muſt ly heavy on the Mind of the Pannel, and produce the ſtrongeſt Sorrow and Regret, in all that had the Honour to know the deceased Earl ; yet the puniſhing the Pannel capitally, for an Offence which happened *Casu magis quam voluntate*, would be a very rigorous Extention of the Law. It is plain from what is above ſaid, That culpable Homicide, both by our Law and Practice, is puniſhable only arbitrarily, and comes under the general Deſcription of casual Homicide in the Act 1661. no Caſe can be more pitiful or favourable than this, where the Death happened to a Perſon noways intended to be hurt ; and therefore, 'tis hoped your Lordſhips will ſuſtain the Defence pled, relevant to reſtrict the Libel to an arbitrary Punishment.

R O. DUNDAS.

ABSTRACT of some ACTS of PARLIAMENT,
in the very Words of the STATUTES themselves.

Ja. I. Parl. 3. A& 51. Entituled, Of Forethought Felony and Chaud-mella,

Statutes, That, as soon as any Complaint is made to Justices, sheriffs, bailiffs, &c. they shall enquire diligently (i. e. without) onie Favour, gif the Deed was done upon forethought Felony or throw suddaine Chaud-mella; and gif it be found forethought Felony --- the Life and Goods of the Trespasser, to be in the King's Will: --- And gif the Tre.pals be done of sudden Chaud-mella, the Party skaith'd shall follow, and the Party Transgressor defend, after the Course of the old Laws of the Realm.

Ja. I. Parl. 6. A& 95. Entituled, The Manslayer suld be pursued untill he be put furth of the Realm, or brought again to the Place of the Slauchter.

The A& appointing the Method of pursuing Manslayers, Statutes, That quhairver he happenis to be takin, that Schireffe, Stuart, or Bailie of the Regality, sall send him to the Schireffe of the nixt Schireffedome, the quhilk sal receive him, and send him to the nixt Schireffe, and swa foorth from Schireffe to Schireffe, quhill he be put to the Schireffe of the Schire, where the Deed was done, and there sall the Law be ministred to the Party: And gif it be forethought Felony, he sall die therefore.

Ja. I. Parl. 6. A& 95. Entituled, Of Inquisition of Forethought Felony, to be taken by ane Assize.

It statutes, That the Officers (i. e. the Judges ordinary) shall give them the Knowledge of an Assize, whether it be forethought Felony, or suddenly done: And gif it be suddenly done, demaine them as the Law treats of before; --- and gif it be forethought Felony, --- demaine them as Law will.

Ja.

Ja. III. Parl. 5. Act 35. Entituled, Of Slaughters, of Forethought Felony, of Suddantie and flying to Girth.

Item. Because of the eschewing of great Slaughters, quibich has been right common amongst the King's Liedges, nowe of late, both of forethought Felony and of Suddantie. And because monie Persons committe Slaughtre upon forethought Felony, in traste they sall be defended throwe the Immunity of the ~~Wainwright~~ Girth, and passis and remainis in Sanctuaries: It is thought Expedient in this present Parliament, for the slanching of the said Slaughters in Time coming, quhair ever Slaughtre is committed on forethought Felony; and the Committer of the said Slaughtre passis and puttis him in Girth, for the Safte of his Person. The Schireffe sall come to the Ordinar, in Places quhair he lyes under his Jurisdiction, and in Places exempt, to the Lords Maisters of the Girth, and let them wit, that sick a Man has committed sick a Crime, on forethought felony, Tanquam insidiator & per industriam, For quibik the Law grants not, nor leaves not sic Persons to joyis the Immunities of the Kirk; and the Schireffe sal require the Ordinar, to let a Knowledge be taken be an Assize, on fifteen Days, quhairder it be forethought felony or not. And if it be founden forethought felony, to be punished after the Kings Laws; and if it be founden Suddantie, to be restorid again to the Freedome and Immunity of Hally-Birk and Girth.

Ja. IV. Parl. 3d. Act 28. Entituled, Auent Manslayers taken or Fugitive.

Statutes, That where any Man happens to be slain within the Realm, the Manslayer shall be pursued (in a certain Manner) and wherever he happens to be overtane, That the Schireffe sall incontinent send him to the next Schireffe and so furth, quhil he be put to the Schireffe of the Schire quhair the Deed was done; and there sall Justice be incontinent done; And giff it be forethought Felony to die therefore.

*2a. V. Par. 4. Act 23. Entituled, The Maisters of the Girth
suld make Deputes, quha suld deliver Male-factoures,
that may not bruike the priviledge thereof.*

*Statutes, That they should be holden in all Time coming, to de-
liver all Committers of Slaughtre upon Forerhought Felony, that
flies to Girth and others Trespasses that breaks the same, and may
not bruike the Priviledge thereof, conform to the Common Law, and
the Act of Parliament made thereupon of before to the King's Officers,
askand and desireand them to underly the Law.*

*Follows the intire Act of CHARLES 2d, Par. 1st,
Chap. 22. Entituled, Concerning the severall De-
grees of CASUAL HOMICIDE.*

*Our Sovereign Lord, with Advice and Consent of the Estates of this
present Parliament for removing of all Question and Doubt that may
arise hereafter in Criminal Pursuits for Slaughtre, statutes and ordains,
That the Cases of Homicide after following, viz. Casual Homicide, Ho-
micide in lawful Defence, and Homicide committed upon Theeves and
Robbers breaking Houses in the Night; or in Case of Homicide the Time
of Mysterful Depredation, or in the Pursuit of denounced or declared
Rebels for Capital Crimes, or of such who assist and defend the Rebels
and masterful Depredators by Arms, and by Force oppose the Pursuit and
apprehending of them, which shall happen to fall out in Time coming, nor
any of them, shall not be punished by Death: And that notwithstanding
of any Laws or Acts of Parliament, or any Practick made heretofore or
observed in punishing of Slaughtre: But that the Manslayer, in any
of the Cases aforesaid be assoillied from any Criminal Pursute pursued a-
gainst him for his Life, for the said Slaughtre, before any Judge Cri-
minal within this Kingdom. Providing always, That in the Case of Ho-
micide casual, and of Homicide in Defence, notwithstanding that the
Slayer is by this Act free from Capital Punishment, yet it shall be
leisum to the Criminal Judge, with Advice of the Council, to fine him in*

his

his Means, to the Use of the Defunct's Wife and Bairns, or nearest of Kin, or to imprison him. And his Majesty, with Advice foresaid, declares, That all Decisions given conform to this Act, since the thirteenth of February 1646 Years, shall be as sufficient to secure all Parties interested, as if this present Act had been of that Date; and that all Cases to be decided by any Judges of this Kingdom, in Relation to casual Homicide in Defence, committed at any Time heretofore, shall be decided as is above expressed.



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